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ABSTRACT

Brief reports on the status of approximately 75 ongoing or recently decided court cases in states of relevance to the mentally retarded are provided. Cases cover the following issues: commitment, community living and services, criminal law, discrimination, guardianship, institutions and deinstitutionalization, medical/legal issues, parental rights and sexuality, and special education. Provided for each case is the name of the state, name and number of case, names or positions of attorneys involved, references to previous reports about the case, a brief description of the issue, and a summary of the current status. Over half the document consists of a brief filed by Advocacy, Inc. concerning involuntary sterilization. The brief provides an historical background of sterilization, a legal analysis of sterilization, and suggests 14 standards to be applied in applications for involuntary sterilization of a disabled individual. (DB)

hds human development services

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of Human Development Services
President's Committee on Mental Retardation

Working with State and Local Agencies to Create Caring Communities

MENTAL RETARDATION and the LAW

A Report on Status of Current Court Cases

June 1980

THE PRESIDENT'S COMMISSION ON MENTAL RETARDATION

THE REGION I DEVELOPMENTAL DISABILITIES OFFICE

Prepared by

THE BOSTON UNIVERSITY CENTER FOR LAW AND HEALTH SCIENCES

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TABLE OF CONTENTS

CASE REPORTS

INSTITUTIONS AND DEINSTITUTIONALIZATION

MEDICAL-LEGAL ISSUES

PARENTAL RIGHTS AND SEXUALITY

SPECIAL EDUCATION

SPECIAL EDUCATION (CONTINUED)

ARTICLE

CALIFORNIA: In re Watson, 154 Cal. Rptr. [illegible] (Ct. App. 1979).

State Appellate Court--Plaintiff's Attorney: Charles E. Ward, Public Defender.

Habeas corpus petition by a woman committed as a developmentally disabled person.

The court held that the denial of petitioner's right to be present during the presentation of evidence against her, in a commitment proceeding which could and did result in a substantial loss of personal liberty, absent an on-the-record showing that petitioner waived that right or was incapable of doing so by reason of either physical or mental incapacity, operated to deprive petitioner of her fundamental constitutional right to due process.

COLORADO: K.W. v. Kort, C.A. No. C2030 (Colo. D. Ct. April 11, 1979).

State Trial Court--Plaintiff's Attorney: Carol Glowinski, Pike's Peak Legal Services, Colorado Springs.

Habeas corpus petition by a child involuntarily committed to state hospital by her parents.

Case reported earlier: MR & L December 1979 p. 2.

The Attorney General's Office appealed to the State Supreme Court, and after filing an opening brief, moved for dismissal of its own appeal. Now pending in the District Court in Pueblo is a motion to have K.W.'s records expunged.

DISTRICT OF COLUMBIA: Poe v. Califano, No. 74-1200 (D. D.C. Sept. 25, 1978).

Federal District Court, class action--Plaintiffs' Attorney: Children's Defense Fund.

Reported earlier: MR & L September 1975 p. 11, December 1975 p. 1, September 1976 p. 1, January 1978 p. 110, October 1978 p. 1.

This final order provides extensive protections to prevent inappropriate hospitalization of children under the age of eighteen in public mental hospitals in the District of Columbia. The court held unconstitutional that portion of the District's code which allowed persons under the age of eighteen to be admitted to mental hospitals against their will as so-called "voluntary" patients when their parents or the District agency having custody over them sought their admission to the hospital and the admitting psychiatrist concurred in their admission. Unlike adults, these children had no procedural protections and no right to release; and the result for a great many was inappropriate long-term institutionalization.

FLORIDA: Kinner v. Florida, No. 78-[illegible] (D. Ct. App. Fla., 2nd Dist., April 2, 1980).

State Appellate Court.

The court held that a state statute concerning the involuntary commitment of mentally retarded persons did not provide sufficient constitutional due process protections.

ILLINOIS: People v. Hill, 391 N.E. 2d 51 (Ill. App. Ct. 1979).

State Appellate Court--Defendant's Attorney Mary M. McCormack.

Defendant: A mentally retarded woman indicted for murder.

The court held that a trial court lacked authority to subject defendant to involuntary commitment proceedings while she was a voluntary patient at a state facility and had not given notice of her desire to leave, although the state contended otherwise.

KANSAS: Powell v. Harder, No. 78-4217 (D. Kan. August 16, 1978).

Federal District Court, Class Action--Plaintiffs' Attorneys: Luis Mata and Lowell C. Paul, Legal Aid Society of Topeka, Inc. and Patients' Rights Center, Inc., Topeka.

This suit has been filed in Federal Court on behalf of adult patients, eighteen years of age or older, in Kansas public mental institutions who have been committed indefinitely without the benefit of notice, counsel, of a hearing under the state's "voluntary" commitment statutes.

On December 13, 1978, the District Court certified the class of plaintiffs and ordered the defendants to notify both the wards and the guardians of the suit.

MARYLAND: Johnson v. Solomon, Civ. No. Y-76-1903 (D. Md. January 17, 1979)

Federal District Court, Class Action.

This action concerns the constitutionality of state law dealing with involuntary civil commitment of juveniles to mental institutions. An original opinion in this case has been modified after negotiations between the parties for the purposes of developing a plan for implementing the decision and of avoiding an appeal by the state. The plan adopted by the court states that counsel must be provided for the juveniles, that commitment may take place only if the court finds there is no less restrictive form of intervention and that mandatory review will take place at least every six months.

NEW YORK: Ruffler v. Phelps Memorial Hospital, 453 F. Supp. 1962 (S.D.N.Y. 1978).

Federal District Court--Plaintiff's Attorney: Michael E. Tiumm.

Plaintiff: An individual who had been civilly committed.

Plaintiff brought a civil rights action to recover damages from the county, medical center, hospitals, and psychiatrist for an alleged involuntary and unlawful hospitalization. The court held that it had jurisdiction, that the alleged deprivation of the plaintiff's constitutional rights was actionable under civil rights statute, and that the private hospital's acts constituted state action.

COMMUNITY LIVING AND SERVICES

CALIFORNIA: Kate School v. Department of Health, 156 Cal. Rptr. 529 (Ct. App. 1979).

State Appellate Court--Plaintiffs' Attorneys: Crossland, Crossland, Caswell and Bell and James M. Bell.

The court held that state regulations prohibiting corporal punishment in community care facilities were valid and effective and could be used as a basis for revocation of license of facility for developmentally disabled persons using behavior modification techniques involving pain and trauma.

FLORIDA: Collier County v. Training and Educational Center for the Handicapped, No. 78-824-CA-01-CTC (20th Cir. for Collier County, January 22, 1979).

State Trial Court.

This suit challenges a restrictive community zoning ordinance.

KENTUCKY: Kavich v. Califano, No. 77-0501 L(A) (W.D. Ky. Feb. 8, 1979)

Federal District Court.

HEW terminated plaintiff's SSI benefits and ordered him to return $2,200 in excess benefits when it was discovered that plaintiff had over $1,500 in resources. Plaintiff, who had saved the excess resources from his SSI benefits, contended that SSI benefits should not be included in determining the amount of his resources for SSI eligibility purposes. Plaintiff also claimed that he had not reported the excess resources because he believed that accumulated benefits didn't count as resource. Therefore, he stated, he had acted in good faith and it would be against good conscience to make him pay back the excess SSI benefits. The court held that accumulated

SSI benefits do count as assets. However, because plaintiff had made an effort to determine whether SSI benefits were excludable and had acted in good faith, the court ordered HEW to waive recovery of overpayment.

MICHIGAN: Bellarmine Hills Association v. The Residential Systems Company, 84 Mich. App. 554 (1978).

State Appellate Court--Plaintiffs' Attorneys: Milmet, Vecchio, Kennedy and Carnago, P.C.

Defendant's Attorneys: Michigan Protection and Advocacy Service for Developmentally Disabled Citizens (by David T. Verseput and William J. Campbell) and Kenneth W. Ostrowski.

The court held that in the situation of a foster home for mentally handicapped children who live permanently in a residence where they receive special care and treatment and where the number of persons assigned to the residence is restricted by license, the children and foster parents constitute a family as a matter of law within the purview of a covenant restricting buildings to single family dwellings.

NEW YORK: Andrews v. Mensch, 418 N.Y.S. 2d 526 (D. Ct. 1979).

Federal District Court--Plaintiffs' Attorneys: Leonard S. Clark and John F. Castellano.

Plaintiffs: Residents of an adult home.

Defendants: Owners and operators of the home.

Plaintiffs brought action to recover "personal allowance" allegedly wrongfully held by defendants. The court held that the owner's withholding from the residents of the amount of personal allowances, equaling the amount of their income which was disregarded in determining eligibility, was unlawful and the residents were entitled to return of the monies withheld as well as double punitive damages.

NEW YORK: Tytell v. Kaen, N.Y.L.J., June 11, 1979, at 12, col. 3 (N.Y. Sup. Ct.).

State Trial Court.

A plan to establish a group home of eight mentally retarded children has been halted by a court decision that the home would violate restrictive covenants in the deeds for the neighborhood.

NEW YORK: Working Organization for Retarded Children v. Birchwood Associates, Case No. (5) H-D-60289-78 (New York State Division of Human Rights).

State Agency--Complainants' Attorney: Murray A. Schneps.

This administrative stipulation of agreement concerns a situation where a real estate corporation, which owns and manages approximately 3,500 apartments, has agreed to rent an apartment (as a group home) to an organization for retarded children after a complaint of discrimination was filed with the New York State Division of Human Rights.

VERMONT: D.C. v. Surles, No. 78-91 (D. Vt. December 21, 1979).

Federal District Court--Plaintiffs' Attorney: Vermont D.D. Law Project.

A settlement has been entered into in this suit concerning admissions to the Brandon Training School in Vermont. Admission shall only be by court order unless it is an emergency, but full due process protections, including counsel, will be afforded any retarded individual being admitted.

CRIMINAL LAW

CALIFORNIA: Cramer v. Tyars, No. MDP-8618 (Cal. Sup. Ct. January 12, 1979).

Highest State Court.

The California Supreme Court, in a 5-2 decision, has ruled that under the state's Welfare and Institutions Code §5602, governing the commitment of dangerous mentally retarded persons, proposed admittees have no right to refuse to become witnesses at their own commitment hearings, and that while they may refuse to testify regarding any matters which would tend to implicate them in criminal matters, the failure of the judge to allow them to assert their privilege against self-incrimination is harmless error where there is overwhelming evidence that they are mentally retarded and dangerous.

LOUISIANA: State v. Hamilton, 373 So. 2d 179 (La. 1979).

Highest State Court--Defendant's Attorney: K. Cuccia, Loyola Law School Clinic.

A case of a mentally retarded defendant indicted for rape was remanded since the record raised questions concerning defendant's capacity to stand trial.

DISCRIMINATION

WEST VIRGINIA: Hurley v. Allied Chemical Corporation, No. CC910 (W.Va. Sup. Ct. Feb. 5, 1980).

State's Highest Court.

On a certified question from a lower court, the court held that state law creates an implied cause of action against a private employer who denies employment to an otherwise qualified individual who has received services for mental illness, mental retardation or addiction.

The unsettled state of the existence of a private right of action under §§503, 504 of the Rehabilitation Act of 1973 continues. (See MR & L, December 1979, p. 9):

1. The United States Supreme Court denied petitions for certiorari in three cases dealing with the sex-discrimination provisions of Title IX of the Education Amendments of 1972 on November 26, 1979. The lower courts utilized Trageser-type reasoning to hold that the statute does not apply to employment discrimination in federally-assisted programs. See: HEW v. Romeo Community Schools, 600 F. 2d 581 (C.A. 6 1979); Harris v. Isleboro School Committee, 593 F. 2d 424 (C.A. 8 1979); Harris v. Junior College District of St. Louis, 579 F. 2d 119 (C.A. 8 1979).

2. A petition for certiorari was filed on August 10, 1979, to decide whether §504 applies to federal agencies. See: Coleman v. Darden, 595 F. 2d 533 (C.A. 10 1979), 48 U.S.L.W. 3165.

3. One Federal District Court found a private right of action under §503. Chaplin v. Consolidated Edison Company of New York, (S.D.N.Y. January 18, 1980), reported at 48 U.S.L.W. 2541.

4. Three courts have not found a private right of action under §503. Rogers v. Frito-Lay, (C.A. 5 February 15, 1980), reported at 48 U.S.L.W. 2575 (A dissenting opinion was filed, however.); Anderson v. Erie Lackawana Railway Co., 468 F. Supp. 934 (E.D. Ohio 1979); Doss v. General Motors Corporation, No. 79-0034-D (C.D. Ill. July 6, 1979).

5. One Federal Court held that §504 creates a private right of action for enforcement, but not damages. Miener v. Missouri, (E.D. Mo. January 25, 1980), reported at 48 U.S.L.W. 2522. But see: Patton v. Dumpson, p. 19 of this issue, and other special education cases cited.

6. Two State Appellate Courts declined to find a right of action under §504, but held for plaintiffs under state law. Silverstein v. Sisters of Charity of Leavenworth Health Services Corporation, No. 78-135 (Colo. Ct. App. December 20, 1979); Zorick v. Tynes, 372 So. 2d 133 (Fla. D. Ct. App. 1979).

GUARDIANSHIP

PENNSYLVANIA: In re Buska, Nos. 11-74-(693, 695, 696, 697, 698, 699, 700, 701, 702, and 704) (Pa. Cambria Cty. C.P., Orphan's Ct. April 7, 10, 11, 12, 1978), appeal docketed, Nos. 87 through 96, March Term 1978 (Pa. Sup. Ct. 1978).

State Appellate Court--Appellants' Attorneys: Public Interest Law Center of Philadelphia.

The case is an appeal of the appointment of guardians for the estates of ten mentally retarded persons. They challenge use of guardianship for controlling small amounts of money received from public benefits.

INSTITUTIONS AND DEINSTITUTIONALIZATION

ALABAMA: Wyatt v. Ireland, C.A. No. 3195-N (N.D. Ala. October 25, 1979) (Other citations omitted.)

Federal District Court, Class Action--Plaintiffs' Attorneys: Stephen J. Ellmann, Southern Poverty Law Center, Montgomery; Amicus: United States Department of Justice.

Plaintiffs: Class of mentally retarded individuals institutionalized in state facilities.

Defendants: State and institutional officials.

Case reported earlier: MR & L September 1975 pp. 67-74, January 1978 p. 12, October 1978 pp. 8-9, December 1979 p. 13.

The court appointed the Governor as Receiver and the first report has been filed with the court. Lepil Gray has been appointed as Monitor.

ARIZONA: Becker v. Hobby Horse Ranch School, Inc., No. Civ. 79-303 TUC RMB (D. Ariz. October 29, 1979).

Federal District Court, Class Action--Plaintiffs' Attorney: Bruce Meyerson, Arizona Center for Law in the Public Interest, Phoenix.

An action for declaratory judgment and injunctive relief was filed by members of the Pima County (Arizona) Association of Retarded Citizens and by directors of the Arizona P & A System for Persons with Developmental Disabilities against the defendant, an unlicensed facility, located in an isolated desert outside Tucson, Arizona, which houses approximately thirteen mildly or moderately mentally retarded adults in allegedly unconstitutional conditions.

FLORIDA: Florida ARC v. Graham, Civ. No. 79-418 (M.D. Fla. August 22, 1979).

Federal District Court, Class Action--Plaintiffs' Attorneys: William R. Barker, Larry Morgan (Greater Orlando Area Legal Services, Inc.), Jane Bloom Yohalem (Developmental Disabilities Rights Center of the Mental Health Law Project).

The plaintiffs seek the closing of Orlando Sunland, a residential institution for persons who are both mentally retarded and physically handicapped, and the creation of community placements and services. The complaint asks that this relief be granted not because all institutions are per se illegal, but because the particular institution cannot now, nor will it ever, be able to provide adequate habilitation.

KENTUCKY: Kentucky ARC v. Conn, C-78-D157-L(A), (W.D. Ky. March 21, 1980).

Federal District Court, Class Action.

Case reported earlier in MR & L January 1978, pp. 23-24.

The court has rejected a challenge based on federal constitutional and statutory grounds to a state plan to build a new rural institution for the retarded to replace the present Outwood facility. The court stated that §504 and the D.D. Act do not mandate deinstitutionalization, but held that the D.D. Act and the Juvenile Justice Delinquency and Prevention Act preclude the use of such an institution as a residential placement for status offenders or mentally retarded criminal offenders. Under state law, the court held that residents are entitled to a statutory right to treatment in the least restrictive environment, that all retarded persons confined in Outwood are to be considered involuntarily committed. The court enjoined defendants from using the institution as a residential placement for any mildly or moderately retarded person, except on an interim respite care basis, and opened the way for §1983 liability against a corporate defendant operating the institution in a manner resulting in violation of resident's rights.

MAINE: Wuori v. Zitnay, Civ. No. 75-80-SD (D. Me. March 19, 1979).

Federal District Court, Class Action.

Reported earlier: MR & L December 1975 pp. 7 & 8, September 1976 p. 18, January 1977 p. 9, April 1977 p. 14, January 1978 p. 24, July 1978 p. 14, October 1978 pp. 11-13.

The Special Master to the United States District Court in Maine has filed a Report of his opinions of the implications of the court's order in this suit and of the implications of its provisions. The Master concludes: "Two major obstacles are impeding full implementation of the court's decree. First, Pineland Center is insisting on implementing the decree according to old Pineland modes of procedure. Second, the Department of Mental Health and Correction is not receiving the cooperation of other state agencies necessary to enable the Department to implement the decree with any celerity."

MASSACHUSETTS: Zerega v. Okin, C.A. 79-1895-2 (D. Mass. September 17, 1979).

Federal District Court--Plaintiff's Attorney: Kenneth N. Margolin, Boston

This complaint seeks proper residential placement and $1 million in damages for a retarded woman who claims regression in her skills since inappropriately being placed in a hospital. Plaintiffs claim violation of the Constitution, the Rehabilitation Act, the Developmental Disabilities Act and state law.

MICHIGAN: Boldt v. Multach, C.A. No. 79-73200 (E.D. Mich. August 15, 1979).

Federal District Court--Plaintiff's Attorney: Thomas J. Budzynski, Mt. Clemens.

A twenty-seven year old married woman with spina bifida is suing her parents and the State of Illinois for $33 million in damages, alleging abandonment, illegal imprisonment and denial of her civil rights by their placement of her in an institution for the retarded at birth, resulting in her functional retardation and emotional distress.

NEW JERSEY: New Jersey ARC v. New Jersey Department of Human Services, No. C-2473-76 (N.J. Super. Ct. Chancery Div. Hunterdon Cty. November 30, 1979).

State Trial Court.

This long-running suit, concerning the Hunterdon State School, was dismissed by the court in a bench opinion because of "progress" the defendant has made in providing improved facilities and programs for residents. The plaintiffs appealed the dismissal to a State Appellate Court on January 14, 1980.

NEW YORK: New York State ARC and Parisi v. Carey, 72 Civ. 356/357 (E.D.N.Y. January 2, 1980).

Federal District Court, Class Action.

Plaintiffs: Residents of the Willowbrook School.

Defendants: State and institutional officials.

Case reported earlier: MR & L September 1975 pp. 88-92, September 1976 p. 14, January 1977 p. 7, April 1977 p. 11, January 1978 p. 20, July 1978 p. 10, October 1978 pp. 7-8, December 1979 p. 17.

The latest order concerns a state program which provided home care payments to the parents of ex-Willowbrook residents, but not to the families of retarded children who had never been institutionalized. The court ordered defendants to provide the funding reasonably necessary to effectuate placements of former Willowbrook residents with their natural parents, consistent with previously generated standards for home placements under the NYSARC decree.

NEW YORK: New York Department of Mental Hygiene v. Schneps, Nos. 203/204 (N.Y. App. Term May 1978).

State Appellate Court.

The court has upheld a patient's right to refuse to pay fees for his retarded child's stay in Willowbrook State Hospital, with the state failing to rebut the parent's charge that Willowbrook's care was grossly inadequate.

PENNSYLVANIA: Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977),—F.2d— (C.A. 3 December 13, 1979), cert. filed March 12, 1980.

United States Supreme Court--Plaintiff's Attorneys: Public Interest Law Center of Philadelphia.

Reported earlier in MR & L July 1978 pp. 16-17, December 1979, p. 16.

The State of Pennsylvania has filed a petition for certiorari with the United States Supreme Court. The Pennsylvania ARC has filed a cross petition, urging the court not to accept cert., or, if it does, to interpret the D.D. Act to require the District Court orders to be affirmed in full. The Third Circuit Court of Appeals had affirmed most of the District Court's order in December, citing the Developmental Disabilities Act as providing a right to appropriate treatment, services and habilitation in the least restrictive environment, and creating a private right of action for enforcement. The Circuit Court did not affirm the closing of Pennhurst, the ban on admissions, or alternate employment schemes for employees. Three judges dissented from the majority opinion.

VERMONT: Griffin v. Board of Civil Authority of the Town of Brandon, No. 198-79RC (Vt. D. Ct., Unit #1 Rutland Cir., February 25, 1980).

State Trial Court--Plaintiff's Attorney: Sally Fox, Vermont Developmental Disabilities Law Project, Burlington.

This case concerned the right to vote of a resident of a state institution for the mentally retarded. Competency was not an issue, and the court held that the test of residency for a resident of an institution is the same as for any citizen: present domicile plus intention to remain indefinitely.

MEDICAL-LEGAL ISSUES

CALIFORNIA: Bothman v. Warren B., 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (Calif. Ct. App., 1st App. Dist. 1979), cert. denied, U.S. Sup. Ct. No. 79-698, reported at 48 U.S.L.W. 3263.

Case reported earlier in MR & L December 1978 p. 20.

The United States Supreme Court's refusal to hear California's appeal in this case means that the parents of a mildly retarded child have successfully blocked the state's attempt to provide the child with lifesaving surgery.

ILLINOIS: Scherer v. Ravenswood Hospital Medical Center, 388 N.E. 2d 1268 (Ill. App. Ct. 1979).

State Appellate Court--Plaintiff's Attorney: James B. Rosenbloom and Alvin E. Rosenbloom, Chicago.

The court held that the evidence which showed that permanent brain damage leading to mental retardation was an unknown and unexpected consequence establishing a mutual mistake of fact, and therefore authorized setting aside a release executed by minor plaintiff thrcugh his father in favor of defendant hospital.

MASSACHUSETTS: Rogers v. Okin, (D. Mass. October 29, 1979), reported at 48 U.S.L.W. 2328.

Federal Appellate Court, Class Action--Plaintiffs' Attorney: Richard Cole, Greater Boston Legal Services.

Plaintiffs: Mentally ill patients committed to Boston State Hospital.

Defendants: State and institutional officials.

Case reported earlier: MR & L December 1979 p. 20.

The defendants have appealed the medication injunction, and the plaintiffs have appealed the denial of damages. Oral argument is scheduled for May 8, 1980, before the First Circuit Court of Appeals.

MASSACHUSETTS: Grant v. Crook, Civ. No. 78-1070 C (D. Mass. 1979).

State Trial Court--Plaintiff's Attorney: Jerrold C. Katz of Bove, Katz and Charmoy, Boston.

This was a medical malpractice case alleging that defendant physician was negligent in failing to perform a timely caesarian section, therefore being responsible for the resulting mental retardation, cerebral palsy, blindness, and quadraparesis suffered in the plaintiff child. The case was settled prior to trial for $5.5 million.

NEW JERSEY: Rennie v. Klein, 476 F. Supp. 1294 (D. N.J. 1979), appeal filed, Nos. 79-2576 and 79-2577 (C.A. 3, January 30, 1980).

Federal Appellate Court, Class Action--Plaintiff's Attorney: N.J. Office of the Public Advocate.

Reported earlier in MR & L December 1979 p. 21.

The defendants have appealed this right-to-refuse-medication lawsuit and the case is now before the Third Circuit Court of Appeals.

PARENTAL RIGHTS AND SEXUALITY

ALABAMA: Hudson v. Hudson, 373 So. 2d 310 (Ala. 1979).

State's Highest Court--Guardian ad litem for appellee: Ben H. Lightfoot, Luverne.

The court held that, absent specific statutory authorization, the inherent equity powers of the states' courts over incompetents and minors did not include the power to authorize a surgical sterilization of a retarded female child.

CALIFORNIA: Carney v. Carney, 598 P. 2d 36 (Cal. 1979).

State's Highest Court.

The California Supreme Court held that the ability of a custodial father, who was left quadriplegic by an automobile accident, to participate in physical activities with his sons is not prima facie evidence of a change in circumstances sufficient to warrant a change of custody to the mother, but is merely one factor to consider in determining the best interest of the child.

DELAWARE: Doe v. Delaware, 407 A. 2d 198 (Del. 1979), cert. granted, U.S. Sup. Ct. No. 79-5932, reported at 48 U.S.L.W. 3632.

The United States Supreme Court will hear a landmark case concerning termination of parental rights. The questions presented to the court are: (1) Is a state statute that permits termination of parental rights if parents are "not fitted" so vague as to offend the 14th Amendment's Due Process Clause? (2) May parents be deprived of their rights on any standard less than "clear and convincing evidence"? (3) May parental rights be terminated absent a showing by the state of a compelling state interest?

NEBRASKA: Linn v. Linn, (Neb. Sup. Ct. January 3, 1980), reported at 48 L.W. 2503.

State's Highest Court.

The court held that a state statute authorizing a court to terminate parental rights solely on the basis of the "best interests and welfare of children", without specifying standards of parental conduct warranting termination, is unconstitutionally vague.

NEW JERSEY: In re Grady, C.A. No. C-1917-78 E (N.J. Sup. Ct. January 24, 1979).

State's Highest Court.

Reported earlier in MR & L December 1979 p. 24.

This sterilization case has been appealed to the State's Supreme Court.

NEW YORK: In re Audrey C., 419 N.Y.S. 2d 209 (App. Div. 1979).

State's Highest Court--Appellant's Attorney: Franklin B. Resseguie, Binghamton

An appeal was taken from a family court order terminating mentally retarded appellant's parental rights. The appellate court held that opinions of a psychologist and a psychiatrist, in the absence of any other explanation of retardation, were sufficient to establish that appellant's retardation originated during developmental period and to shift statutory burden of proof to establish otherwise upon appellant.

NEW YORK: In re Judy and Donald G. and Jewish Child Care Association v. Benjamin and Rhoda G. (N.Y. Fam. Ct. February 1, 1980).

Family Court--Law Guardian for Judy and Donald G.: Stuart Weinstein of Legal Aid Society of N.Y.C.

The court in this case ruled that state law unconstitutionally abridged the fundamental rights of mentally disabled parents by forcing the adoption of their children, who are in foster homes, and terminating parental rights on the ground that the parents are mentally retarded. The court stated, "The idea that adoption of such children invariably promotes their welfare and best interests is simply not true".

OHIO: Heller v. Miller (Ohio Sup. Ct. January 2, 1980), reported at 48 L.W. 2488.

State's Highest Court.

The court, with two judges dissenting, has held that the state and federal equal protection and due process guarantees entitle indigent parents to state-provided counsel and a transcript to appeal adverse rulings in state-initiated suits to terminate their parental rights.

TEXAS: In re Gonzalez, No. 150518 (Bexar Cty. Probate Ct., Texas, March 6, 1980).

State Trial Court.

Amicus: Advocacy, Inc.

This case concerns an application by the guardians/adoptive parents of a twenty-two year old mentally retarded woman for authority to consent to a sterilization. The Trial Court granted the request, but the Guardian Ad Litem has appealed to the San Antonio Court of Civil Appeals.

UTAH: In re P.L.L., 597 P. 2d 886 (Utah 1979).

State's Highest Court--Appellant's Attorneys: Utah Legal Services, Inc., James R. Hasenyager, Ogden.

The court held that the record supported an order terminating the parental rights of a mentally retarded mother, given her limitations and the special needs of her handicapped child.

WASHINGTON: In re Hayes, No. 45612 (Wash. Sup. Ct. 1979).

State's Highest Court.

Amicus: Mental Health Law Project, Washington, D.C.

After a Trial Court opinion that the court did not have power, absent specific statutory authority, to authorize sterilization of a mentally incompetent child, petitioner appealed to the State Supreme Court, which held the court did have jurisdiction and established standards and the burden of proof for use in such circumstances.

SPECIAL EDUCATION

CALIFORNIA: Area VI Developmental Disabilities Board v. Riles, No. 284172 (Cal. Super. Ct., Sacramento Cty., September 17, 1979).

State Trial Court.

The State Attorney General has filed this suit on behalf of an area developmental disabilities board seeking to compel the state's departments of

education and developmental service[illegible]rovide appropriate education to school aged residents of a state ho[illegible].

COLORADO: Casement v. Douglas County School District, C.A. No. 4935 (Colo. D. Ct., Douglas Cty., October 25, 1979).

Federal District Court.

This court held that a school district policy that denied handicapped children the same school bus transportation provided to non-handicapped children residing in the district, was a denial of equal protection under the Fourteenth Amendment.

CONNECTICUT: Loughram v. Flanders, Civ. No. H 77-649 (D. Conn. April 18, 1979).

Federal District Court--Plaintiff's Attorney: Igor I. Sikorsky, Jr.

This P.L. 94-142 suit, on behalf of a learning-disabled child, sought to implement an individualized course of instruction and sought one million dollars damages for negligence of defendant school board in failing to implement an appropriate program earlier in the plaintiff's school career. The parties agreed to a program, and the court ruled that P.L. 94-142 does not contain an implied cause of action for damages.

DISTRICT OF COLUMBIA: Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

Federal District Court, Class Action--Plaintiffs' Attorneys: Mental Health Law project, Washington, D.C.

Case reported earlier: MR & L September 1975 pp. 24-28.

Recent implementation-related papers filed in this ongoing case deal with problems of evaluations, placement, hearing officer decisions, and inadequate placements.

FLORIDA: Jenkins v. Florida, No. 79-102-CIV-J-C (M.D. Fla. February 2, 1979).

Federal District Court, Class Action.

A class action suit has been filed in Florida challenging the state's practice of charging parents for the residential care received by their mentally retarded children aged five to eighteen. The complaint relies on §504, P.L. 94-142, and the Fourteenth Amendment.

HAWAII: Doe v. Clark, Civ. No. 78-0394 (D. Hawaii, April 4, 1979).

Federal District Court--Plaintiff's Attorney: Michael A. Town.

This case's consent decree concerns changes in the acts and practices of the State of Hawaii in provision of special education services.

KENTUCKY: Kaelin v. Grubbs, Civ. Action No. 79-55 (E.D. Ky., May 11, 1979).

Federal District Court--Plaintiff's Attorney: James K. Rogers, Northern Kentucky Legal Aid Society, Covington.

This is an action on behalf of a handicapped child, seeking injunctive and other remedial relief against defendants who expelled him from a public school. Plaintiff argued that P.L. 94-142 procedural protections were not followed in this instance, but lost a motion for a temporary restraining order.

MARYLAND: Alley v. Anne Arundel County Board of Education (U.S.D.C. D. Md. 1979).

Federal District Court, Class Action--Plaintiffs' Attorneys: Legum, Cochran, Chartrand and Wyatt, P.A., Annapolis and Maryland Advocacy Unit for the Developmentally Disabled, Baltimore.

The plaintiffs in this suit ask for injunctive relief against defendants for their failure to provide a free appropriate public education to handicapped school-age children who were "in dire need of physical and occupational therapy". The court ordered preliminary relief since plaintiffs would suffer irreparable injury if relief was not granted.

MASSACHUSETTS: Allen v. McDonough, C.A. No. 14948 (Mass. Super. Ct. May 25, 1979).

State Trial Court, Class Action--Plaintiffs' Attorneys: Mark S. Brodin, Lawyers' Committee for Civil Rights under Law of the Boston Bar Association and Thomas A. Mela, Mass. Advocacy Center, Boston.

Plaintiffs: Boston School Children who have been denied special education services.

Defendants: Boston School Committee and the Superintendent of Schools.

Case reported earlier: MR & L January 1978 p. 15, July 1978 p. 3, December 1979 p. 30.

On January 18, 1980, the plaintiffs in this case went back to court alleging failure of defendant Boston School Committee to comply with the court's earlier orders, focusing on defendant's failure to provide plaintiffs with proper transportation to school, and ask for monetary damages.

MICHIGAN: Dady v. School Board for the City of Rochester, 282 N.W. 2d 328 (Mich. Ct. App. 1979).

State Appellate Court--Plaintiff's Attorney: James F. Hewson, Warren.

The court held that state law does not require the special education program of a public school to render "medical" services to a handicapped child when such care is a condition of child's ability to attend the program.

MINNESOTA: Laura M. v. Special School District No. 1, 4-79 Civ. 123 (D. Minn. January 21, 1980).

Federal District Court--Plaintiff's Attorney: Eric S. Janus, Legal Aid Society of Minneapolis, Inc.

In this case, the court found that an I.E.P. proposed by a school was inappropriate, but denied a claim for retroactive tuition reimbursement.

MINNESOTA: A.J. v. Special School District No. 1, C. 4-77-192 (D. Minn. 4 Div., October 12, 1979).

Federal District Court.

This suit challenged the lawfulness of a student's disciplinary suspension from school. Although successful on state statutory grounds, the plaintiff's claim under the special education statutes was dismissed since the child had not yet been identified as a handicapped child.

MONTANA: In re "A" Family, (Mont. Sup. Ct., October 26, 1979), reported at 48 L.W. 2346.

State's Highest Court.

The court has held that federal law, which allows states to provide free "psychological services" to mentally handicapped children, "overrides" a Montana regulation that excludes provision of psychotherapy costs.

NEW HAMPSHIRE: Laconia School District v. New Hampshire State Board of Education, (N.H. Super. Ct., Merrimack Cty., January 1980 term).

State Superior Court.

This is a petition for declaratory judgment filed on behalf of forty school districts. The plaintiffs request (1) that a determination that state law permits and allows the state department of education to pay the providers of special education directly without passing the funds through the local school district, and (2) that the liability of local school district for tuition, transportation, room and board of handicapped students educated outside the district is limited to twice the state average cost per pupil of the current expenses of operation of the plaintiff schools as estimated by the state for the preceeding year.

NEW MEXICO: Schells v. Albuquerque Public School District, No. 79-488-M (D. N.M., June 15, 1979).

Federal District Court, Class Action.

This action has been brought to stop the practice of using special education classes "as a dumping ground for large numbers of minority children who are not mentally handicapped, but were placed there as a result of racial and cultural bias".

NEW YORK: Jose P. v. Ambach, No. 79 C270 (E.D.N.Y., Feb. 1, 1979).

Federal District Court, Class Action--Plaintiffs' Attorneys: John C. Grant Jr., Brooklyn Legal Services.

Plaintiffs: Handicapped children.

Defendant: City Board of Education.

This action alleges that the defendant has failed to provide the plaintiffs with a free appropriate public education as required by law. The complaint alleges that the defendants have not evaluated and placed the children in appropriate programs within a reasonable period of time.

NEW YORK: Pietro v. St. Joseph's School, (N.Y. Sup. Ct., September 21, 1979), reported at 48 L.W. 2229.

State Trial Court.

The court has held that public policy precludes recognition of a child's or parent's "educational malpractice" suit against a private school for its alleged failure to educate the child.

NEW YORK: In re Jones, 414 N.Y.S. 2d 258 (Fam. Ct. 1979)

Family Court--Child's Attorney: Joseph Shuter, Legal Aid Society, Jamaica.

The court has ruled that parents are not required by New York law to contribute to the maintenance costs of a handicapped child who attends a residential school during the summer months. Legitimate educational expenses must be borne by the local and state authorities.

NEW YORK: Patton v. Dumpson, (U.S.D.C. S.D.N.Y., January 23, 1980), reported at 48 L.W. 2523.

Federal District Court.

The court held that §504 of the Rehabilitation Act implicitly creates a private damages action against municipal child welfare agency officials for failure to provide education to a handicapped child.

OHIO: Rettig v. Kent City School District, C.A. No. C 79-2234 (N.D. Ohio, December 13, 1979).

Federal District Court, Class Action.

This suit seeks state funding for special education and related services for handicapped children on a twelve month per year basis.

OKLAHOMA: Baker v. Butler Public School District, No. 79-629 (W.D. Okla., May 23, 1979).

Federal District Court.

Plaintiff has filed for injunctive relief and $1 million in damages against a school district for deliberately removing a sixteen year old trainable mentally retarded child from a program designed for her needs within the school system and placing her forty miles away at a non-residential program which has no suitable services.

PENNSYLVANIA: Armstrong v. Kline, Civ. Action No. 78-172 (E.D. Penn., June 21, 1979)

Pennsylvania--Federal District Court, Class Action--Plaintiffs' Attorney: Janet F. Stottland, Education Law Center, 2100 Lewis Tower Bldg., 225 South 15th St., Philadelphia, PA., 19102.

Plaintiffs: Named children and class of all handicapped school aged persons in Pennsylvania who require or may require a program of special education services in excess of 180 days per year, and parents/guardians of such persons.

Defendants: State Secretary of Education, Local School Districts and officials.

Case reported earlier: MR & L December 1979 p. 32.

Oral argument was made in an appeal before Third Circuit Court of Appeals on January 14, 1980.

RHODE ISLAND: In re Doe, 390 A. 2d 390 (R.I. 1978).

State's Highest Court--Plaintiff's Attorney: Betsy E. Grossman, Rhode Island Legal Services, Inc., Newport; Guardian ad litem for child: Richard P. D'Addario.

The court held that the state was not required by the Constitution to provide treatment services at unlimited annual expense for an emotionally disturbed child whose condition might or might not be improved.

SOUTH CAROLINA: South Carolina ARC v. Williams, (D.S. Car., July 20, 1979).

Federal District Court, Class Action--Plaintiffs' Attorneys: The South Carolina Protection and Advocacy System for the Handicapped, Inc. and the Mental Health Law Project.

This suit, seeks provision of year-round special education services to handicapped children under P.L. 94-142 and §504.

TENNESSEE: Doe v. Henderson, A-7980-1.

State Chancery Court, Class Action--Plaintiffs' Attorney: Legal Services of Middle Tennessee, Nashville.

This is a right to treatment suit filed on behalf of youth offenders with mental retardation. The suit alleges that the correctional institutes do not provide adequate treatment including special education as required under P.L. 94-142, Section 504 and state statute.

TEXAS: Becky B. v. Douglas, C.A. No. CA3-79-1280-F (N.D. Tx., Dallas Div., dismissed March 5, 1980); Jeffrey K. v. Amarillo Independent School District, C.A. No. 280-56 (N.D. Tx., Amarillo Div., filed March 24, 1980).

Federal District Court--Plaintiff's Attorney: Advocacy, Inc.

These two cases concern plaintiffs who seek placement of a severely multiply-handicapped autistic child in a private residential education facility. The school districts where the children reside contend that the child must either be served on a day-to-day basis in the district or institutionalized in a state school for the retarded. Becky B. was voluntarily dismissed, but Jeffrey K., now pending, addresses the same issues.

TEXAS: Tatro v. Texas, 481 F. Supp. 1224 (N.D. Tx., 1979).

Federal District Court.

This action called for injunctive and monetary relief against defendant school officials for their refusal to provide catheterization services for plaintiff's three and one half year old child. The court held (1) that the P.L. 94-142 regulations referring to a "school health service" could not create a duty on part of defendant school officials to provide catheterization where such a duty was not otherwise required in the statute as a "related service", and (2) §504 could not be interpreted as requiring the school to furnish catheterization when it was needed regardless of whether the child was taking advantage of any educational programs or none.

VERMONT: K.B. v. Withey, No. 78-288 (D. Vt., December 15, 1978).

Federal District Court--Plaintiff's Attorney: Neil H. Mickenberg, Vermont Legal Aid, Inc.

This is an action for relief under P.L. 94-142 and §504 alleging denial of special education services for a handicapped student and his expulsion from school in violation of due process rights.

VERMONT: K.M. v. Withey, C.A. No. 79-21 (D. Vt., July 5, 1979).

Federal District Court.

Under a consent decree in this suit, the court orders that due process hearings shall be held within forty-five days of receipt of a request, and that there shall be no continuances in such hearings except by written order of a hearing officer.

INTRODUCTION

The following Amicus Curiae brief was submitted by attorneys for Advocacy, Inc., the Texas Protection and Advocacy system for developmentally disabled persons, in a suit seeking the sterilization of a mentally retarded young woman. Amicus submitted to the Court this informational, rather than argumentative, brief which relates the history of sterilization of disabled persons in this country, and discusses the modern constitutional analysis of state sterilization statutes. The brief proposes standards and procedures which could be followed by a court in deciding the sterilization question, assuming that the court found it had jurisdiction to make that decision. This Amicus brief set a high standard for the conduct of the trial and assisted the Court and all parties in understanding the complex legal issues. Amicus further assisted the trial court by eliciting relevant testimony, particularly from the numerous expert witnesses called by the parties. After all the testimony was obtained and evidence adduced, Amicus strongly urged at oral argument that the application for sterilization be denied. The trial judge held that he had no jurisdiction to approve the proposed sterilization. If appealed, attorneys from Advocacy, Inc. will request leave to file an Amicus Curiae brief opposing the proposed sterilization with the state appellate court.

Advocacy, Inc. attorneys concluded that the approach taken as Amicus at this trial resulted in extremely effective advocacy for the developmentally disabled. The Court and all parties reportedly found the Amicus brief extremely valuable in preparing for trial and developing a good record for appeal. By reserving the right to take a position on the merits of the case at oral argument, Amicus was also able to play a more traditional advocacy role at trial. The reprinted Brief that follows may be especially helpful to advocates planning to adopt a similar approach in the trial of sterilization suits not brought pursuant to a state sterilization statute.

No. 150,518

IN THE COUNTY COURT

SITTING IN MATTERS PROBATE

BEXAR COUNTY, TEXAS

* * * * * * * * *

IN RE GUARDIANSHIP OF THE PERSON AND ESTATE

OF

SYLVIA JEAN GONZALEZ

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BRIEF OF AMICUS CURIAE

* * * * * * * *

Sandra Hale Adams

Gayle Bebee

James C. Todd

AMICUS CURIAE

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Austin, Texas 78751

SUBJECT INDEX

ARGUMENT AND AUTHORITIES

I. HISTORICAL BACKGROUND

Sterilization in the United States of criminals, the mentally and physically impaired, and others deemed "unfit" found its roots in the eugenics movement of the late nineteenth and early twentieth centuries. Ferster, E.Z. "Eliminating the Unfit -- Is Sterilization the Answer?", 27 OHIO S.L.J. 591, 591 (1966); Bergdorf, R.L., Jr., and M.P. Bergdorf, "The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons," 50 TEMPLE L.Q. 955, 997 (1977); Bligh, R., "Sterilization and Mental Retardation," 51 A.B.A.J. 1059, 1060 (1965); Vuckowich, W.T., "The Dawning of the Brave New World - Legal, Ethical and Social Issues of Eugenics," 1971 U. ILL. L. FORUM 189, 189 (1971). "Eugenics," a word derived from a Greek term meaning "well born" or "good birth," was coined in 1883 by Sir Frances Galton who defined it as "the study of agencies under social control that may improve or impair...future generations either physically or mentally." Ferster, supra, quoting A. Deutch, THE MENTALLY ILL IN AMERICA, 357-58 (2d ed. 1949). The eugenics movement, supported by Mendelian principles of heredity developed in the nineteenth century and Social Darwinism, embraced two distinct notions, positive eugenics -- the promotion of reproduction of the biologically fit -- and negative eugenics -- the restriction of reproduction by mental and moral defectives. Ferster, supra, at 592; Vukowich, supra; Bergdorf and Bergdorf, supra at 997; and Bligh, supra at 1060. The movement was further fueled by genealogical studies in the nineteenth and twentiety centuries of families, such as the Jukes, Kalikaks, Nams, and Ishmael tribe, which seemed to evidence, generation after generation, a propensity for criminal, degenerate, and mentally infirm progeny. Bligh, supra, and Bergdorf and Bergdorf, supra, at 997-998. These studies supported

the idea that Mendelian principles were applicable to the heredity of complex traits in humans in the same way as they applied to the transmission of more simple traits in plants. Mentally retarded persons became widely viewed as a major cause of society's ills, as was epitomized in a 1919 Governor's report from Kansas:

> All the feeble-minded lack self-control . . . Their immoral tendencies and lack of self-control make the birth rate among them unusually high . . . we know that feeble-mindedness is inherited and that inheritance is responsible for two-thirds of the feeble-minded population . . . We know that the social evil is fed from the ranks of feeble-minded women, and that feeble-minded men and women spread veneral disease . . . Their tendencies to pauperism and crime would seem to be sufficient grounds to justify the claim that the feeble-minded are a menace to society, yet these items pale into insignificance before the third, which is the power of heredity of this kind of stock. Feeble-mindedness is transmitted from father to son, from grandparents to grandchildren, with a sureness and a prolificness that is simply appalling. Traced back at least five generations, it shows no tendency of running out. Sometimes it skips a generation, coming out in the grandchildren with redoubled force . . . If we would cope successfully with the problems of mental defectiveness and feeble-mindedness we must put aside sentiment and deal with it in a practical manner.

Bligh, supra, at 1060-1061, citing the Report of the Commission on Provision for the Feeble-minded on the Kalikaks of Kansas, authorized by Henry J. Allen, Governor, January 1, 1919, pp. 6-14. Fears about the degeneration of the human species were echoed in a law review note advocating sterilization legislation for Kentucky:

> Since time immemorial, the criminal and defective have been the "cancer of society." Strong, intelligent, useful families are becoming smaller and smaller; while irresponsible, diseased, defective families are becoming larger. The result can only be race degeneration. To prevent this race suicide we must prevent the socially inadequate persons from propagating their kind, i.e., the feebleminded, epileptic, insane, criminal, diseased, and others.

Note, "A Sterilization Statute for Kentucky," 23 KY.L.J. 168, 168 (1934).

Various methods were used to prevent the reproduction of those deemed "unfit" -- euthanasia, segregation, prohibitions against sexual relations and marriage, and compulsory sterilization. Bergdorf and Bergdorf, supra, at 998-999, and Vukowich, supra, at 214-216. But compulsory sterilization as a tool of negative eugenics did not become practical until the late nineteenth century when safe, effective, and morally acceptable methods for sterilization were developed. During the 1890's, Superintendent Pilcher of the Winfield Kansas State Home for the Feeble-Minded constrated forty-four boys and fourteen girls until public outrage forced Pilcher to quit. Ferster, supra, at 592, and Bergdorf and Bergdorf, supra, at 999. By the close of the nineteenth century, Dr. Harry Sharp had devised the surgical procedure of vasectomy for males and the procedures developed in France and Switzerland for salpingectomy -- the cutting or removing of the fallopian tubes -- had also reached the United States. Id. With the development of these relatively safe and more morally acceptable surgical procedures for sterilization, sterilizations of the mentally retarded substantially increased, especially in the state institutions, despite the fact that no state had enacted any legislation authirizing them. Id.

Legislation providing for the sterilization of defectives was first introduced in 1897 in the Michigan legislature. Ferster, supra, at 593-593, and Bergdorf and Bergdorf, supra at 999-1000. The bill was defeated. Ferster, supra, at 593, and Bergdorf and Bergdorf, supra, at 1000. The Pennsylvania legislature passed a sterilization bill in 1905, but it was vetoed by Governor Pennypacker, Id. In 1907, Indiana, Dr. Sharp's home state, enacted

legislation which provided for the sterilization of institutionalized criminals, idiots, imbeciles, and rapists. Bergdorf and Bergdorf, supra. By 1930, twenty-eight states had enacted sterilization legislation; but the Indiana statute was declared unconstitutional in Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921), and other state statutes met similar fates prior to 1925. Ferster, supra. These statutes were variously declared violative of the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment's prohibition against cruel and unusual punishments. Mickle v. Henricks, 262 F. 687, 690-691 (D. Nev. 1918); Davis v. Berry, 216 F. 413, 416-417 (S.D. Iowa 1914); In re Opinion of the Justices, 230 Ala. 543, 547, 162 So. 123, 128 (1935); Williams v. Smith, 190 Ind. 526, 528, 131 N.E. 2, 2 (1921); Haynes v. Lapeer Circuit Judge, 201 Mich. 138, 145, 166 N.W. 938, 941 (1918); Smith v. Board of Examiners, 85 N.J.L. 46, 55, 88 A. 963, 966-967 (1913); Osborn v. Thomson, 103 Misc. 23, 35, 169 N.Y.S. 638, 644 (Sup. Ct.) aff'd, 185 App. Div. 902, 171 N.Y.S. 1094 (1918). The Iowa statute was found to impermissibly constitute a bill of attainder. Davis v. Berry, supra, at 419.

The Supreme Court's decision in Buck v. Bell, 274 U.S. 200 (1927), reversed this trend of courts to find state sterilization statutes unconstitutional. Carrie Buck was committed to the State Colony for Epileptics and Feebleminded at Lynchburg, Virginia in 1924. Buck v. Bell, 130 S.E. 516, 517 (1925). Pursuant to The Virginia Sterilization Act, 1924 Va. Acts 569-71 (repealed in 1968), the superintendent of the colony presented a petition to sterilize Carrie Buck to the Colony's board of directors, alleging that Carrie had the mind of a nine-year-old, was the parent of a mentally defective, illegitimate child, and was the daughter of a woman previously committed to

the Colony for feeble-mindedness. Gaylord, C.L., "The Sterilization of Carrie Buck," CASE AND COMMENT, (September-October 1978). Carrie's state appointed guardian appealed the decision of the Colony's board to sterilize her by salpingectomy to the Circuit Court of Amhurst County where, after trial, the court upheld the board's order. Buck v. Bell, supra. The Supreme Court of Appeals of Virginia upheld the circuit court's decision and rejected arguments that the statute denied equal protection of the laws, violated substantive andprocedure due process, and constituted a cruel and unusual punishment. Buck v. Bell, supra, at 519. Upon appeal to the United States Supreme Court, only the equal protection and substantive and procedural due process claims were urged.

Writing for the Supreme Court, Justice Oliver Wendell Holmes held that the Virginia statute was a reasonable exercise of the state's police power, violating neither the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Buck v. Bell, 274 U.S. 200 (1927). Justice Holmes analogized the sterilization of defectives to wartime service and compulsory small pox vaccination as justifiable exercises of the state's police power. Buck v. Bell, at 207. The equal protection and due process claims were rejected and the Court found the statute to be rationally related to valid state purposes. Buck v. Bell, supra, at 208. Eugenic justifications for sterilizing the "unfit" under the state's police power were endorsed by the Court, as exemplified by one of the most often quoted passages of Justice Holmes' opinion:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes ... Three generations of imbeciles are enough.

Buck v. Bell, supra, at 207. Buck v. Bell gave impetus to the negative eugenic movement and twenty sterilization statutes, mostly modeled after the Virginia law, were enacted during the succeeding ten years. Ferster, supra, at 595.

The eugenics movement waned in the 1930's as American scientists, discovering that its scientific bases were more questionable than initially believed, began to de-emphasize the role of negative eugenics in eliminating the "unfit." Bergdorf and Bergdorf, supra, at 1007. The American Neurological Association issued a report in 1936 urging that environmental factors were as important or more so than genetic factors in causing handicaps and that there was no clear evidence supporting a genetic decline in humans. Bergdorf and Bergdorf, supra, at 1007-1008. The eugenic justification for sterilizing the mentally retarded has now been largely discredited (see discussion, infra). The horrors of eugenic sterilization practices under the Nazi regime in Germany may well have played a significant role in the Supreme Court's stricter scrutiny of the Oklahoma sterilization statute, found unconstitutional in Skinner v. Oklahoma, 316 U.S. 535 (1942). Writing for the Court, Justice William O Douglas broke stride with Justice Holmes' stamp of approval for sterilizing defectives and cautioned about the dangers of such laws:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.

Id., at 541. The Skinner decision marks the beginning of the modern constitutional analysis applied to state statutes authorizing the sterilization of criminals and the mentally and physically handicapped.

II. MODERN LEGAL ANALYSIS OF STERILIZATION

A. The right to procreate is a fundamental constitutional right encompassed within the constitutional right of privacy which applies equally to all United States and Texas citizens, including incompetent and mentally retarded persons.

the Constitution does not explicitly mention any right of privacy, the Supreme Court has recognized that a right of personal privacy, or a guarantee of areas or zones of privacy, exist under the Constitution. In a variety of contexts, the court or individual Justices have found the sources of the constitutional right to privacy in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifty Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350-351 (1967); Boyd v. United States, 116 U.S. 616 (1886) Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-485 (1965); in the Ninth Amendment, Id., at 486-487 (Goldberg, J. concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Only personal rights that are deemed "fundamental" or "implicit in the concept of ordered liberty" are encompassed by this constitutional right of privacy. Palko v. Connecticut, 302 U.S. 319, 325 (1937). Roe v. Wade, 410 U.S. 113, 153 (1973).

The right of procreation was first recognized as a fundamental constitutional right in Skinner v. Oklahoma, supra, at 541. The Court found the Oklahoma sterilization statute violative of the Equal Protection Clause of the

Fourteenth Amendment because it required the involuntary sterilization of convicted larcenists, but not convicted embezzlers.

The fundamental nature of the right to procreate was further solidified by the Supreme Court's decision regarding contraception in Griswold v. Connecticut, supra, at 485-486, where the Court held that the marriage relationship falls within a "zone of privacy created by several fundamental constitutional guarantees." Id., at 485. In 1972, relying on Griswold, the Court held in Eisenstadt v. Baird that the right of privacy encompasses the decision whether or not to have children and that this right is equally applicable to unmarried as well as married persons:

> If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), (emphasis added).

The Court has found that the right of privacy is sufficiently broad to encompass a woman's decision to terminate her pregnancy, absent countervailing, compelling state interests. Roe v. Wade, supra, at 153-154. However, the Court refused to hold that a woman's right to abort is absolute, acknowledging that some state regulation in areas protected by the constitutional right of privacy is appropriate where the state can demonstrate a compelling state interest. In Roe v. Wade, supra, the Supreme Court held that the state may regulate abortions after the first trimester so long as the regulation is reasonably related to the preservation and protection of maternal health and to the protection of a viable fetus.

The constitutional right to privacy concerning procreation extends to minors as well as adults. Carey v. Population Services International, 431 U.S. 678 (1977) and Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). Courts have recently held that this privacy right applies to incompetent, as well as competent persons. In Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. Sup. Jud. Ct. 1977), the court extended to an incompetent, mentally retarded man the same right of privacy to refuse treatment accorded those competent to refuse treatment:

> It does not advance the interest of the state or the ward to treat the ward as a person of lesser status or dignity than others. To protect the incompetent person with its power, the State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons.

Id., at 428. See also In the Matter of Quinlan, 355 A.2d 647 (N.J. 1976), and Kaimowitz v. Department of Mental Health for the State of Michigan, No. 73-19434, 1 M.D.L.R. 147 (September-October 1976) (Mich. Cir. Ct., July 10, 1973).

Furthermore, Constitutional protections are not waived or forfeited by individuals simply because their intellectual functioning and adaptive behavior falls in the "mentally retarded" range. Mentally retarded persons possess all the rights of other United States citizens. New York Association for Retarded Citizens, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975) and Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1977), aff'd in part, remanded in part, Nos. 78-1490, 78-1564, 78-1602, __F.2d__ (CA 3 December 13, 1979). See also Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973), prohibiting discrimination

against mentally and physically handicapped persons in programs and activities receiving federal financial assistance. In accordance with this principle, every court that has recently considered the issue has explicitly or implicitly recognized that the right of procreation is a fundamental right of mentally retarded individuals. In re Sterilization of Moore, 289 N.C. 95, 221 S.E.2d 307 (N.C. 1976); Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978); North Carolina Association for Retarded Citizens v. State of North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976); Wyatt v. Aderholt, 368 F. Supp. 1383 (M.D. Ala. 1973); Guardianship of Tulley, 146 Cal. Rptr. 266 (Cal. Sup., First District, Division 2, 1978); Application of A.D., 394 N.Y.S. 2d 139 (Surr. Ct., Nassau County, 1977); In the Matter of the Sterilization of Cavitt, 182 Neb. 712, 157 N.W. 2d 171 (Neb. 1968); Hudson v. Hudson, 373 So. 2d 310, (Ala. 1979).

This trend to accord all mentally retarded persons the same rights accorded others has been affirmed and codified by the Texas Legislature in the Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. ANN. art. 5547-300 (Vernon Supp. 1980):

> Every mentally retarded person in this state shall have the rights, benefits, and privileges guaranteed by the constitution and laws of the State of Texas . . . The rights of mentally retarded persons which are specifically enumerated in this Act are in addition to all other rights enjoyed by the mentally retarded, and such listing of rights is not exclusive or intended to limit in any way rights which are guaranteed to the mentally retarded under the laws and constitutions of the United States and the State of Texas.

TEX. REV. CIV. STAT. ANN. art. 5547-300, § 5 (Vernon Supp. 1980). The purpose of the Bill of Rights Section of this Act is "to recognize and protect the individual dignity and worth of mentally retarded persons."

TEX. REV. CIV. STAT. ANN. art. 5547-300, § 4 (Vernon Supp. 1980). These two provisions contained in the Mentally Retarded Persons Act make it abundantly clear that the Texas Legislature intends that all constitutional rights -- including the right of privacy and the right of procreation -- are rights enjoyed by all mentally retarded Texans.

B. The right of privacy may include the right to be voluntarily sterilized.

The holding of the Supreme Court in Griswold v. Connecticut, supra, that citizens have a fundamental, constitutional right to decide whether or not to bear or beget a child provides a legal basis for the view that there is a constitutional right to voluntary sterilization as a means of contraception. See Vukowich, supra, at 217-218. Some states have explicitly legitimized voluntary sterilization procedures, see Vukowich, supra, n. 138 at 217, and some courts have indicated such a right exists. In Ponter v. Ponter, 135 N.J. Super 50 (Ch. 1975), the court held that a married woman had a constitutional right to be sterilized without spousal consent. Highlighting the fundamental nature of a woman's right to choose whether or not have children, the court stated:

> Notwithstanding the fact Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct.1110, 86 L.Ed. 1655 (1942), characterized procreation as a basic civil right, the courts have still considered a woman's right not to procreate paramount.

Ponter v. Ponter, supra, at 54. The First Circuit, emphasizing that the right to sterilization is constitutionally protected, ordered a hospital to perform sterilizations. Hathaway v. Worcester City Hospital, 475 F.2d 701

(CA 1 1973). Analogously, in Doe v. Bridgeton Hospital Association 71 N.J. 478, 366 A.2d 641 (1976), cert. denied, 433 U.S. 914, 97 S. Ct. 2987 (1977), the New Jersey Supreme Court ruled that the state's "Conscience Law," N.J.S.A. 2A:65A-1 et seq., which states that no hospitals are required to provide procedures for abortion or sterilization, could not be interpreted to permit a nonsectarian, non-profit hospital to refuse to perform elective abortions at the hospital because such state action would frustate a woman's constitutional right to an abortion during the first trimester. By analogy, this same reasoning is applicable to voluntary sterilizations.

It is a well accepted tenet of American law that generally an individual's informed consent is required for any surgical operation lest the physician performing the operation be liable for assault, battery, or medical malpractive. The three basic elements of a legally valid, informed consent are: (1) legal capacity; (2) an understanding, by the person consenting, of the nature, purpose, risks, and benefits of the proposed procedure; and (3) voluntariness. See Comment, "Sterilization of Mental Defectives: Compulsion and Consent," 27 BAYLOR L. REV. 174, 186-190 (1975). The Mentally Retarded Persons Act of 1977 provides a definition of "legally adequate consent," applicable to the provisions of the Act, which incorporates these three required elements:

> "Legally adequate consent" means consent given by a person when each of the following conditions has been met:
>
> (A) legal capacity: the person giving the consent is of the minimum legal age and has not been adjudicated incompetent to manage his personal affairs by an appropriate court of law;
>
> (B) comprehension of information: the person giving the consent has been informed of and comprehends the nature, purpose, consequences, risks, and benefits of and alternatives to the procedure ...; and

(C) voluntariness: the consent has been given voluntarily and free from coercion and undue influence.

TEX. REV. CIV. STAT. ANN. art. 5547-300, § 3(20)(Vernon Supp.1980)

It cannot be assumed that all mentally retarded individuals are incapable of giving an informed consent to a voluntary sterilization procedure. Under Texas law, mentally retarded persons, so long as they have no legally-appointed guardian, are presumed legally competent. TEX. REV. CIV. STAT. ANN. art. art. 5547-300, § 13 (Vernon Supp.1980). It follows that mentally retarded persons without legal guardians are presumed under Texas law to be legally competent to consent to voluntary sterilization, just like any other Texas citizen. This presumption is supported by scientific studies indicating that many mentally retarded individuals can appreciate the meaning of sterilization. In a study of 50 mentally retarded persons discharged from the Pacific State Hospital in California between June 1949 and June 1958, Sabagh and Edgerton found that fully 40 of these mentally retarded individuals understood the meaning of their sterilization:

> It was abundantly clear that the remaining 40 persons were not only capable of understanding the implications of the sterilization operation but were eager to express themselves on the subject.
>
> Hospital records indicate that 38 of the 42 patients that had been sterilized were sterilized at Pacific State Hospital between 1931 and 1951. A median number of about 10 months elapsed between the date when the sterilization operation was performed. But, at the time when the patient was interviewed, anywhere from 9 to 29 years had lapsed since that operation had been performed. It is, perhaps, indicative of the importance of this event that even after such a long period many patients still had a vivid recollection of this experience.
>
> The experience of this study contradicts the assumption made by some investigators concerning the ability of mental retardates to understand the meaning and implication of sterilization and to discuss their

reactions to it. For example, with reference to comparable mildly retarded patients, Popenoe (1928, p. 283) asserted that:

> "We made no attempt to direct expressions of opinion from those sterilized at the state home for the feebleminded, believing that their testimony would not be valuable, in view of their mental level."

This assumption was reiterated some years later by Woodside who, in a social and psychological study of sterilization, asserted that "the type of interview envisaged would be beyond the intellectual capacity" of mentally defective women, and, hence, decided to "transfer the field of inquiry to normal women who had undergone therapeutic sterilizations." (Woodside, 1950, p. 116). That the assumption by Popenoe, Woodside, and others may be unwarranted is also suggested by the findings of a Norwegian follow-up study of castrated subjects (Bremer, 1959). A number of mentally retarded persons were included in this study and many of these persons were able to express their reactions to castration.

G. Sabagh and Edgerton, R.B., "Sterilized Mental Defectives Look at Eugenic Sterilization," 9 EUGENICS Q. 213, 215-216 (1962). One commentator urges that virtually all midly and some moderately retarded individuals can give a valid, informed consent to sterilization:

> Retardation is not co-extensive with lack of capacity to give informed consent. Most mentally retarded persons can appreciate the responsibilities of parenthood and the implications of sterilization. This is certainly true of the 90 percent who suffer from mild retardation. Likewise, many considered to be moderately retarded might also be capable of informed consent. Those who proved to be of doubtful competence could perhaps be assisted in their decision by professional counseling, provided it was strictly limited to noncoercive advice.

C.W. Murdock, "Sterilization of the Retarded: A Problem or a Solution?" 62 CAL. L. REV. 917, 933 (1974). See also P. Roos, "Psychological Impact of Sterilization on the Individual," 1975 LAW & PSYCH. REV. 45, 51 (Spring, 1975).

A problem arises, however, if sterilization is sought by an incompetent person because these persons lack the legal capacity to give informed consent to medical and surgical interventions. 45 TEX. JR. 2d Physicians and Other Healers § 101 (1963). See also the Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. ANN. art. 5547-300, § 3(20)(A) (Vernon Supp. 1980). The incompetent's guardian of the person is "entitled to the charge and control of the person of the ward, and the care of his support and education." TEX. PROB. CODE ANN. § 229 (Vernon 1956). Because (1) managing conservators are authorized to consent to medical and surgical treatment for their conservatee minors, TEX. FAM. CODE ANN. § 14.02(b)(5) (Vernon 1975), and (2) a guardian of the person's powers and duties are coextensive with those of a managing conservator, In re Guardianship of Henson, 551 S.W. 2d 136 (Tex. Civ. App. -- Corpus Christi 1977, writ ref'd n.r.e.), it follows that a guardian of the person is authorized to consent to medical and surgical treatment for his ward. However, it must be emphasized that the power of guardians to consent to surgical intrusions of the ward's person is limited to the power to consent to medical treatment, TEX. PROB. CODE ANN. § 229 (Vernon 1956); In re Guardianship of Henson, supra; TEX. FAM. CODE ANN. § 14.02(b)(5) (Vernon 1975). The term "treatment," as defined in BLACK's LAW DICTIONARY, is a "broad term covering all the steps taken to effect a cure of an injury or disease; the word including examination and diagnosis as well as application of remedies," BLACK'S LAW DICTIONARY, at 1673 (rev. 4th ed. 1968) (emphasis added). It is doubtful that a Texas guardian possesses the authority to consent to his ward's sterilization unless the sterilization is medically necessary "to effect a cure of an injury or disease," as in the case of a malignant ovary. Medical treatment designed to effect a cure of injury or disease would ordinarily not encompass

a sterilization designed to prevent future psychological harm from an unwanted pregnancy.

Given the highly personal nature of the right to procreate and the stringent constitutional protections afforded all privacy rights, it is not surprising that courts have held that a minor's or ward's sterilization is not ordinary medical or surgical treatment that merely requires the consent of a parent or guardian of the person. See Ruby v. Massey, supra; Holmes v. Powers, 439 S.W. 2d 597 (Ky. 1968); A.L. v. G.R.H., 325 N.E. 2d 501, 74 A.L.R. 3d 1220 (Ind. Ct. App.), cert. denied, 96 S. Ct. 1669 (1975); and In the Interest of M.K.R., 515 S.W. 2d 467 (Mo. 1974). The Houston Court of Civil Appeals' decision in Frazier v. Levi, 440 S.W. 2d 393 (Tex. Civ. App. -- Houston [1st Dist.] 1969, no writ), is in accord that sterilization does not fall within the ambit of medical or surgical treatment for which consent may validly be given by a guardian of the person:

> As a mentally incompetent person, the ward lacks the mental capacity to consent to the operation or to oppose it. Her legal rights are to be carefully protected and must not be taken from her without due process of law even though her natural mother and guardian feels that the operation would benefit all.

Id., at 394.

Amicus urges that guardians should not have unfettered discretion to have their wards sterilized, because of potential abuse where the guardian's and ward's interests conflict. A guardian may desire his ward's sterilization because he fears the ward will be promiscuous and will incur an unwanted pregnancy. The guardian may fear that the ward will bear retarded offspring or that the ward will make an unfit parent, thereby encumbering the guardian with the

responsibility of raising the ward's children. Finally the guardian may be unduly overprotective of his mentally retarded ward. See Murdock, supra at 932-933. Cognizant of the dangers of a conflict of interest between guardian and ward in the sterilization context, a three-judge federal court found unconstitutional a provision of North Carolina's involuntary sterilization statute which required the director of a state institution or the county director of Social Services to file a petition for sterilization "when the next of kin or legal guardian of the retarded person requests that he file the petition," N.C. Gen. Stat. § 35-39. North Carolina Association for Retarded Citizens v. State of North Carolina, supra. The court stated:

> We conclude that subparagraph 4 of Section 39 is irrational and irreconcilable with the first three subparagraphs. The first three paragraphs make out a complete and sensible scheme: that the public servant concern himself either with the best interest of the retarded person or the best interest of the public, or both, and that he act to begin the procedure only when in his opinion the retarded person would either likely procreate a defective child or would himself be unable to care for his own child or children. All of this makes sense. The fourth subparagraph does not. Instead, it grants to the retarded person's next of kin or legal guardian the power of a tyrant: for any reason or for no reason at all, he may require an otherwise responsible public servant to initiate the procedure. This he may do without reference to any standard and without regard to the public interest or the interest of the retarded person. We think such confidence in all next of kin and all legal guardians is misplaced, and that the unstated premises of competency to decide to force initiation of the proceeding and never failing fidelity to the interest of the retarded person are invalid. We hold this subsection four unconstitutional as an arbitrary and capricious delegation of unbridled power and a correspondingly irrational withdrawal of responsibility sensibly placed upon the director of the institution or the county director of Social Services by the other three coherent and compatible subparagraphs.

Id., at 455-456 (emphasis added).

In light of the foregoing, Amicus urges that it is improper for a parent or guardian to consent to this child's or ward's sterilization without the child or ward being afforded substantive and procedural due process protections.

C. Because the right to procreate is a fundamental, constitutional right, limitations upon that right must be narrowly drawn to further a compelling state interest.

The "compelling state interest test" is the measure for evaluating whether a state statute unconstitutionally infringes upon an individual's fundamental rights. Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). "Strict scrutiny" is required when the state statute under consideration infringes on fundamental, constitutional rights. Shapiro v. Thompson, 394 U.S. 618 (1969); San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973). The cases suggest that in order to demonstrate a compelling state interest it must be shown that the statute is required to promote a compelling state interest, that the state's compelling interest is outweighed by the interests of those subject to the statute, and that the statute is narrowly drawn and furthers only the compelling state interest. Bates v. City of Little Rock, supra; Roe v. Wade, supra; Cantwell v. Connecticut, 310 U.S. 296 (1940); San Antonio Independent School District v. Rodriquez, supra, at 16-17; North Carolina Association for Retarded Citizens, supra; In the Matter of Grady, 170 N.J. Super. 98, 405 A.2d 851 (N.J. Super. Ct. Ch. Div., 1979); In re Sterilization of Moore, supra; and Application of A.D., supra.

State sterilization statutes and court decisions evidence three recurring justifications for sterilizaing mentally retarded citizens: (1) eugenic justifications; (2) social justifications, most often than the person will be an unfit parent and that his or her children will likely drain state welfare resources; and (3) the justification, grounded in the parens patriae powers of equity courts, that the ward would consent to the sterilization or that involuntary sterilization is in the ward's best interests.

D. Eugenic justifications for sterilizing mentally retarded persons have been largely discredited.

As discussed, supra, state sterilization statutes developed principally as a result of the eugenics movement of the late nineteenth and early twentieth centuries. Although the Supreme Court in Buck v. Bell found that the Virginia sterilization statute was rationally related to the valid (but not necessarily compelling) state purpose of avoiding another generation of retarded persons, eugenic justifications for involuntary sterilization have been largely discredited.

The basis for concluding that sterilization would reduce incompetence and improve the gene pool was the assumption that deficiencies such as mental retardation are inheritable. Most authorities today believe that only a small percentage of mental retardation is inherited. See Ferster, supra, at 602-604; Bligh, supra, at 1061-1062; Comment, 27 BAYLOR L. REV. 174, 180-181 (1975); Murdock, supra, at 924-928. Bergdorf and Bergdorf, supra, at 1007-1008; and Fujita, B., N. Wagner, and R. Pion, M.D., "Sexuality, Contraception and the Mentally Retarded," 47 POST GRAD. MED. 193, 194 (1970). Three different causes of mental retardation have been discerned: purely

genetic, genetic and environmental, and purely environmental. Murdock, supra, at 924. Mental retardation resulting purely from environmental conditions conditions -- such as birth traumas, impoverished intellectual environments, and childhood fevers -- clearly cannot be prevented by sterilization. Murdock, supra, at 925. Some genetic defects result in mental retardation only in conjunction with environmental factors, such as diet. When genetic and environmental factors together are necessary to produce mental retardation, identifying and controlling the environmental conditions is sufficient to prevent retardation. Id. Finally, even retardation caused by purely genetic factors, as in the case of Downs Syndrome and Tay Sachs disease, would not be significantly curtailed by sterilizing those afflicted since eighty to ninety percent of all mentally retarded individuals are born to parents of normal intelligence. Murdock, supra, at 924-925. But if retardation is caused by a dominent gene, as in Downs Syndrome, there is a fifty percent chance of retardation in the offspring, although Downs Syndrome individuals are most often found to be sterile. Id.

Recent court decisions acknowledge that eugenic justifications for sterilization have been largely discredited. In In re Cavitt, supra, at 177, the Nebraska Supreme Court rejected the contention that the Nebraska sterilization statute was defective because it failed to require a finding that the individual's children would inherit a tendency to mental deficiency on the basis that "the advances in medical science have dispelled the theory that all mental defectives produce mental defectives and all normal persons do not." The court in Cavitt went on, however, to find the Nebraska statute reasonably related to the promotion of the public welfare. And although the three judge court in North Carolina Association for Retarded Citizens v.

State of North Carolina, supra, acknowledged that in some circumstances medical science can determine that a genetic defect is substantially likely to be inherited and to result in retarded offspring, in another passage the court cast serious doubt on the efficacy and breadth of eugenic justifications for sterilizing the mentally retarded:

> Most competent geneticists now reject social Darwinism and doubt the premise implicit in Mr. Justice Holmes' incantation that "... three generations of imbeciles are enough." But however doubtful is the efficacy of sterilization to improve the quality of the human race, there is substantial medical opinion that it may be occasionally desirable and indicated. Not even Dr. Clements, who testified for the United States and expressed strongly his general disapproval of sterilization for the mentally retarded, would go so as to say that in an extreme case he would not use an involuntary sterilization statute if available. We think it is a fair statement, from the expert testimony we have heard and read, to say that the best opinion presently is that rarely would a competent doctor recommend involuntary sterilization -- but that he might do so in an extreme case. As a corollary to that proposition, it is also fair to say, we think, that prevalent medical opinion views with distaste even voluntary sterilization for the mentally retarded and is inclined to sanction it only as a last resort and in relatively extreme cases. In short, the medical and genetical experts are no longer sold on sterilization to benefit either retarded patients or the future of the Republic.

Id., at 454.

Because eugenic justifications have been largely discredited and because involuntary sterilization statutes are now subject to "strict scrutiny" or to a "compelling state interest test" under the more recent right to privacy Supreme Court decisions, most commentators doubt the continuing viability of Buck v. Bell, supra; Bergdorf and Bergdorf, supra, at 1006-1012; Ferster, supra, at 596, 617; Murdock, supra, at 921-4.

E. Fitness for parenthood as a justification for sterilization.

The second justification advanced for involuntary sterilization is fitness for parenthood. This justification is found in state sterilization statutes as well as in a few cases granting sterilization petitions. See, for example, N. C. Gen. Stat. § 35-39; Cook v. State of Oregon, 495 P.2d 786 (Or. App. 1972); In re Simpson, 180 N.E.2d 206 (Ohio Prob. Ct., Zanesville County, 1962). This rationale is based upon the state's police power, some cases indicating that the state's compelling interest may be to prevent the bearing of offspring likely to become public charges and to drain welfare resources. As the court stated in In re Simpson, supra:

> Application has been made to the Muskingum County Welfare Department for Aid for Dependent Children payments for the child already born. To permit Nora Ann to have further children would result in additional burdens upon the county and state welfare departments, which have already been compelled to reduce payments because of shortage of funds, and have consistently importuned the General Assembly for additional funds.

Id., at 208.

However, it cannot be assumed that all mentally retarded individuals are incapable of effective parenting, especially if assistance is made available to them. Although the standard definition of mental retardation is simple enough [the Mentally Retarded Persons Act defines it as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period," TEX. REV. CIV. STAT. ANN. art. 5547-300, § 3(5) (Vernon Supp. 1980), it encompasses enormous variations in ability. There are four recognized levels of retardation - mild, moderate, severe, and profound - and approximately

90% of retarded individuals are only mildly retarded. National Association for Retarded Persons, FACTS ON MENTAL RETARDATION 6 (1973). MIldly retarded individuals are usually capable of self-sufficiency if they receive proper special education and training. Moderately retarded persons encompass those who can learn to maintain a home environment and who are often able to earn at least part of their livelihood in a sheltered workshop. Severely retarded persons can be taught self-help skills such as toileting, dressing, or eating. They most commonly require supervised living arrangements. A few in this group may earn some money in sheltered employment, but most are not economically productive. Profoundly retarded individuals may be able to learn self-care, but most do not progress beyond this level and require supervised living arrangements. See A. Anastasi, PSYCHOLOGICAL TESTING, pp. 238-239 (4th ed. 1976).

IQ along is considered by many to be an imprecise basis for evaluating fitness for parenting because testing scores and functional ability can be improved through appropriate education and training. Bergdorf and Bergdorf, supra, at 928-929; Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295, 1311 (E.D. Pa. 1977). See also, Anastasi, supra, at 59-61 and 349-350. The Texas Legislature has explicitly recognized this ability of mentally retarded persons to gain competencies throughout life in the Mentally Retarded Persons Act:

> It is the public policy of the state that mentally retarded persons should have the opportunity to develop to the fullest extent possible their potential for becoming productive members of society.

TEX. REV. CIV. STAT. ANN. art. 5547-300, § 2(a)(Vernon Supp. 1980).

> Every mentally retarded person shall have the right to receive adequate treatment and habilitative services for mental retardation suited to the person's individual needs to maximize the person's capabilities and enhance the person's ability to cope with his environment.

TEX. REV. CIV. STAT. ANN. art. 5547-300 § 11 (Vernon Supp. 1980) (emphasis added.).

> Every mentally retarded person shall have the right to receive publicly supported educational services provided by the Texas Education Code. The services provided to every mentally retarded person shall be appropriate to his individual needs, regardless of chronological age.

TEX. REV. CIV. STAT. ANN. art. 5547-300, § 8 (Vernon Supp. 1980) (emphasis added). That the Texas Legislature is of the view that mentally retarded persons' capabilities can increase over time is also reflected in the Legislature's statement in the Limited Guardianship Act that limited guardianship for mentally retarded persons can be, indeed "shall" be, "designed to encourage the development of maximum self reliance and independence in the individual..." TEX. PROB. CODE ANN. § 130A (Vernon Supp. 1980).

No doubt, there is a correlation between intelligence and fitness for parenting. However, many studies indicate that mildly and moderately retarded individuals are capable of effectively fulfilling the responsibilities of parenthood. Hogg, G., "Marriage Among Mentally Retarded In a Community Based Program" (unpublished paper); Fujita, supra, at 194-195; Floor, L., D. Baxter, M. Rosen, and L. Zisfein, "A Survey of Marriages Among Previously Institutionalized Retardates," 13 MENTAL RETARDATION 33 (1975); Mickelson, P., "The Feebleminded Parent: A Study of 90 Family Cases," 51 AM. J. MENT. DEF.

644 (1947); Mickelson, P. "Can Mentally Deficient Parents Be Helped to Give Their Children Better Care?" 53 AM. J. MENT. DEF. 516 (1949); Bergdorf and and Bergdorf, supra, at 1021, 1030-1031; and Murdock, supra, at 930. In a thoughtful article, Phillip Roos, Executive Director of the National Association for Retarded Citizens, stated:

> Eugenic considerations are not, of course, the only justification for sterilization of mentally retarded persons. An important consideration is the concern that retarded parents may be incapable of raising children (e.g., Pitts, 1973), although this assumption has been seriously questioned (e.g. Brakel and Rock, 1971). In fact it has been argued that some mentally retarded persons may well possess the qualities most critical to good parenthood and that I.Q. is not a criterion for child rearing (Chez, 1971). Mattinson (1971) recently reported that one mother with an I.Q. of 48 and another with an I.Q. of 41 could provide adequate care for preschool children.

Roos, supra, at 47.

Predicting who will and who will not be fit for parenthood may be exceedingly difficult.

> There are no objective, identifiable criteria which determine that a person will be a good parent. Assets such as education, wealth, and intelligence do not always insure that a person will possess the ability to adequately care for and nourish children. Emotional relationships are more determinative of parenting ability than one's intelligence quotient.

Bergdorf and Bergdorf, supra, at 1021. See also Bligh, supra, at 1062. However, some retarded individuals may be so severely or profoundly retarded that it is possible to predict with sufficient accuracy that they would be incapable of meeting the responsibilities of parenthood. See North Carolina Association for Retarded Citizens v. State of North Carolina, supra, at 454-455.

Finally, unfitness for parenthood as a justification for involuntary sterilization may be subject to attack on equal protection grounds because unfitness for parenting is not characteristic of or limited to the mentally impaired. Bergdorf and Bergdorf, supra, at 1030-1031; Ferster, supra, at 617-618. Just as the Supreme Court found Oklahoma's sterilization statute a denial of equal protection in Skinner v. Oklahoma, supra, because larcenists but not embezzlers were subject to its provisions, statutes which single out mentally impaired persons for involuntary sterilization, but not others unfit to raise children, may violate the Equal Protection Clause of the Fourteenth Amendment. In North Carolina Association for Retarded Citizens v. State of North Carolina, supra, the court found no violation of equal protection on this basis; however, the court's analysis has been questioned by at least one commentator who urges that the court impermissibly relied on a "rational basis test" to evaluate the equal protection claim. See Bergdorf and Bergdorf, supra, at 1030-1031. State-initiated involuntary sterilizations of nonhandicapped and noncriminal persons deemed unfit for parenthood would probably not be well received by the public at large.

F. Justifications for involuntary sterilization under the parens patriae power of equity courts.

A few courts have authorized involuntary sterilizations of mentally impaired individuals under the parens patriae power of equity courts. In the Matter of Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (N.Y. Sup. Ct., Queens County, 1976); In re Simpson, supra; and In the Matter of Grady, supra. However, the great weight of authority is that in the absence of specific statutory authority, courts lack jurisdiction to order involuntary sterilizations. Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971), motion for re-

consideration denied, 356 F. Supp. 380 (1973); Holmes v. Powers, supra; In the Interest of M.K.R., supra; Guardianship of the Person and Estate of Kemp, 43 Cal. App. 743, 118 Cal. Rptr. 64 (Cal. App. 1974); A.L. v. G.R.H., supra; Application of A.D., supra; In the Matter of S.C.E., 378 A.2d 144 (Del. Ch. 1977); Hudson v. Hudson, supra; Guardianship of Tulley, 146 Cal. Rptr. 266 (Cal. App. 1978); Frazier v. Levi, 440 S.W. 2d 303 (Tex. Civ. App. -- Houston 1969, no writ); and In re Lambert, No. 61156 (Tenn. P. Ct. 1976) cited in Bergdorf and Bergdorf, supra, n. 197 at 1022. The reason for the reluctance of courts to order involuntary sterilization absent state statutory authority was well expressed by the court in Guardianship of Tulley, supra, at 268:

> To begin with, it has been widely recognized that sterilization (even if medically and socially indicated) is an extreme remedy which irreversibly denies a human being the fundamental right to bear and beget a child. Accordingly, the overwhelming majority of courts hold that the jurisdiction to exercise such awesome power may not be inferred from the general principles of common law, but rather must derive from specific legislative authorization.

The Houston Court of Civil Appeals addressed precisely this issue in 1969 in Frazier v. Levi, supra. In Frazier, the aged guardian of the person and estate of a 34 year old mentally retarded ward who was sexually promiscuous and who had borne two illegitimate children she was unable to support or care for petitioned the county court for an order authorizing the ward's sterilization. Apparently no medical reasons were advanced in favor of the guardian's application. The ward's court appointed guardian ad litem filed a general demurrer, asserting that there were no grounds under Texas law for granting the guardian's petition. The guardian did not amend her petition and the

county court dismissed her application. The guardian appealed this decision to the district court which also sustained the guardian ad litem's exception and dismissed the case. On appeal, the guardian argued that the district court improperly dismissed the case and that there were legal ground in Texas upon which an application for sexual sterilization could be granted. The Houston Court of Civil Appeals examined Article 5, Section 16, of the Texas Constitution which grants to county courts the general jurisdiction of probate courts to appoint guardians and transact all business pertaining to guardianships. Sections 36 and 229 of the Texas Probate Code were also examined. The court held that none of these provisions provided authority for county courts with probate jurisdiction to order a sexual sterilization. Id., at 394. The court then rejected the argument that Section 32 of the Texas Probate Code conferred jurisdiction, citing In re Guardianship of Estate of Neal, 406 S.W. 2d 496 (Tex. Civ. App. -- Houston 1966, writ ref. n.r.e.) and the court's holding in Neal that Section 32 of the Texas Probate Code, by its silence, denies by implication the exercise by the probate court of equitable powers. In conclusion, the court in Frazier stated:

> Any order authorizing the operation proposed by the appellant would be in excess of the power delegated by the statutes of Texas and would be invalid.

Frazier v. Levi, supra, at 395. See also TEX. REV. CIV. STAT. ANN. art. 3174b-2 (Vernon 1968) which prohibits state school and hospital superintendents from authorizing sexual sterilizations of institutionalized residents.

Despite the majority view that absent specific statutory authority courts have no jurisdiction to order sexual sterilizations, a few courts have found authority under their parens patriae powers, making use of either the "sub-

stituted judgment doctrine" or the "best interest test." See cases cited, supra, at p. 19-20.

1. The substituted judgment doctrine.

The traditional substituted judgment doctrine was originally invoked by courts with equity jurisdiction to make gifts from an incompetent's estate when it appeard the incompetent would have done so, if incompetent. Baron, Botsford and Cole, "Live Organ and Tissue Transplants from Minor Donors in Massachusetts," 55 B.U.L. REV. 159, n.4 at 170 (1975), and Schultz, Swartz, and Appelbaum, "Deciding Right-to-Die Cases Involving Incompetent Patients: Jones v. Saikewicz," 11 SUFF. U.L. REV. 936, 943-949 (1977). The doctrine was first expressed by Lord Eldon in the leading case of Ex Parte Whitbread, 35 Eng. Rep. 878 (Ch. 1816). Whitbread set forth both objective and subjective standards to guide guardians and courts in making decisions regarding an incompetent's estate. Schultz, supra, at 943-944. Under the subjective standard, guardians and courts are to consider "what it is likely the Lunatic himself would do, if he were in a capacity to act." Ex Parte Whitbread, supra, at 879. Under the objective standard, guardians and courts may administer the ward's property "in such manner as the court thinks it would have been wise and prudent in the Lunatic himself to apply it, in case he had been capable." Id.

Traditionally, the substituted judgment doctrine has been limited to cases involving the administration of an incompetent's estate. Schultz, supra, at 946 and Baron, supra, n. 54 at 170. Recently, however, a few courts have invoked the substituted judgment doctrine in matters relating to the ward's person. Strunk v. Strunk, 445 S.W. 2d 145 (Ky. 1969); Hart v. Brown, 289 A. 2d 386 (Conn. Super. Ct. 1972); Superintendent of Belchertown State School v. Saikewicz, 370 N.E. 2d 417 (Mass. Sup. Jud. Ct. 1977); and In the

Matter of Quinlan, supra. In Strunk and Hart the courts invoked the substituted judgment test in life-saving situations to permit an incompetent and a minor child to donate kidneys to relatives suffering from end-stage renal disease. In Saikewicz, the doctrine was invoked to permit a court appointed guardian to refuse painful chemotherapy treatment on behalf of Joseph Saikewicz, a 67-year-old, institutionalized, mentally retarded man with an IQ of 10 who was dying of myoblastic monocytic leukemia. Superintendent of Belchertown State School v. Saikewicz, supra. In Quinlan, the court used both the substituted judgment doctrine and best interests rationale to permit a guardian to consent to the withdrawal of intrusive life-supporting machines in his ward's behalf. The ward was comatose and in a vegetative state. Invoking the substituted judgment doctrine, the court stated:

> ...we have concluded that Karen's right of privacy may be asserted on her behalf by her guardian under the peculiar circumstances here present.
>
> If a putative decision by Karen to permit this non-cognitive, vegetative existence to terminate by natural forces is regarded as a valuable incident of her right of privacy, as we believe it to be, then it should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice. The only practical way to prevent destruction of the right is to permit the guardian and family of Karen to render their best judgment, subject to the qualifications hereinafter stated, as to whether she would exercise it in these circumstances. If their conclusion is in the affirmative this decision should be accepted by a society the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them. It is for this reason that we determine that Karen's right of privacy may be asserted in her behalf, in this respect, by her guardian and family under the particular circumstances of this case.

In the Matter of Quinlan, supra, at 664.

In the Matter of Grady, supra, is a thoughtful opinion supporting a judge's decision to invoke the substituted judgment doctrine to grant an involuntary

sterilization in the absence of specific statutory authority. Lee Ann Grady was an 18 year old, severely retarded, Down's Syndrome woman who, because of the genetic basis of her disability, was found by the court to be unlikely to improve in mental development. Id., at 853.

The court found it unlikely that Lee Ann would reach any significant level of independence and that in all likelihood she would remain incapable of caring for offspring or making reasoned decisions concerning procreation and contraception. Id. Expressing an enlightened view of the sexuality of mentally retarded individuals, Judge Polow wrote:

> The fact is that the majority of the retarded population has the same basic need for love and sexual expression as the nonhandicapped. This need varies in intensity just as in the normal population, except for the profoundly retarded who exhibit little or no desire for sexual gratification.
>
> The current professional trend is toward encouraging interaction among mentally handicapped persons of opposite sexes for the achievement of greater maturity and living experience. Sexual experiences and encounters are not to be prohibited. The applicants envision the relief sought here as factor toward attainment of such a goal without the need for constant intensive supervision.

Id., at 856. Analogizing from In the Matter of Quinlan, supra, Judge Polow held that Lee Ann had a constitutional privacy interest in choosing whether or not to be sterilized which, because of her incompetence, could not be exercised absent approval of the court acting in parens patriae. Id., at 863. Judge Polow held that the court had power to grant the parents' application because the following conditions existed:

1. ...the subject is incapable of understanding the nature of the sexual function, reproduction or sterilization and cannot comprehend the nature of these proceedings, hence is incompetent;

2. ...such incompetency is in all likelihood permanent;

3. ...the incompetent is presumably not infertile and not incapable of procreation;

4. ...all procedural safeguards have been satisfied, including appointment of a guardian ad litem to act as counsel for the incompetent during court proceedings, with full opportunity to present proofs and cross-examine witnesses;

5. ...the applicants have demonstrated their genuine good faith and...their primary concern is for the best interest of the incompetent rather than their own or the public's convenience.

Id. at 865. Judge Polow then granted the application of Lee Ann's parents, empowering them:

> To decide as they deem she would were she capable of informed judgment. This may include, in their second discretion, the exercise of their substituted consent to any method of temporary or permanent contraception as shall conform with responsible medical advice.

Id., at 866.

Amicus believes that the San Antonio Court of Civil Appeal's decision in Little v. Little, 576 S.W. 2d 493 (Tex. Civ. App. -- San Antonio 1979, no writ), which approved the donation of a kidney by a mentally retarded, incompetent minor to her ailing younger brother, probably did not rest on the substituted judgment doctrine, but rather on a "best interest" test. The court discussed the substituted judgment doctrine at 497-498, distinguising In re Guardianship of Estate of Neal, supra, but then applied what may be best characterized as a "best interests" analysis. Little v. Little, supra, at 498-500.

The subjective substituted judgment standard requires the court and/or guardian to determine the incompetent's actual interests and preferences. More accurately, the court's or guardian's decision should be "that which

would be made by the incompetent person, if that person were competent, but taking into accout the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person." Superintendent of Belchertown State School v. Saikewicz, supra, at 431. For example, under the analysis in Saikewicz, a court applying the substituted judgment doctrine in an involuntary sterilization situation would have to consider the fear and anxiety an incompetent might experience when subjected to hospital routines and surgical procedures she does not understand.

The subjective standard of the substituted judgment doctrine is fraught with pitfalls and dangers. The doctrine is exceedingly difficult, if not impossible, to apply when there have been no prior indications of the incompetent's wishes. A severely or profoundly, non-communicative retarded person in most cases has no prior period of competency upon which to base a determination that the person would desire sterilization. The subjective standard would require courts to weigh the importance an incompetent person places on such values as love, marriage, pain, and parenthood.

The objective standard of the substituted judgment doctrine, which attempts to ascertain what most persons would do in similar circumstances, could be applied. However, it cannot be assumed that all mentally retarded persons would choose sterilization, as evidenced by a scientific study in which two-thirds of the involuntarily sterilized mentally retarded persons studied "did not approve of the sterilization operation which they had to undergo." Sabagh, supra, at 221.

The substituted judgment doctrine has been disapproved in Texas. In re Guardianship of Estate of Neal, 406 S.W. 2d 496 (Tex. Civ. App. -- Houston

[1st Dist.]), writ ref'd n.r.e. per curiam, 407 S.W. 2d 770 (Tex. 1966). However, the court in Little v. Little, supra, suggested that Neal is distinguishable from those situations in which the guardian's action in the ward's behalf will result in benefits the ward will enjoy during his or her lifetime. Little v. Little, supra, at 498. This distinguishing feature could support a court's invoking the substituted judgment doctrine in cases of involuntary sterilization of an incompetent where tangible benefits to the ward can be demonstrated over the course of his or her lifetime.

In light of the dangers and difficulties involved in applying the substituted judgment doctrine in matters relating to the ward's person, it is not at all surprising that courts usually invoke the doctrine only in life-and-death situations, such as kidney transplant and terminal illness cases. But see In the Matter of Grady, discussed supra.

2. The best interests test.

A few courts have found jurisdiction to order an involuntary sterilization absent state statutory authority under the parens patriae power of equity courts, using a "best interests" test. In the Matter of Sallmaier, supra, and In re Simpson, supra. In In re Simpson, supra, Judge Gary ordered a salpingectomy for an 18 year old, physically attractive, mentally retarded woman with an I.Q. of 36 who had already borne one illegitimate child. The woman was sexually promiscuous and was found unable to care for the child she already had. In his opinion, Judge Gary noted that application had been made for county welfare funds for the child already born and that

further children would resul in additional burdens upon state and county welfare resources, already in short supply. Id., at 208. Eugenic reasons were also alluded to. Id., at 207. Finding that the young woman was "feebleminded" under Ohio statutes and that her interests as well as society's interests would be promoted if she were sterilized, Judge Gary ruled that he had jurisdiction to order the salpingectomy because "the authority granted this court by the statutes is extremely broad." Id.

Judge Gary's decision in Simpson has met with strong criticism from commentators. See Bergdorf and Bergdorf, supra, at 1015; Ferster, supra, at 608; Note, "Sterilization of Mental Defectives," 61 MICH. L. REV. 1359, 1364 (1964) (stating: "It is difficult, if not impossible, to avoid the conclusion that this court has simply conjured up a novel power without historical or statutory basis"); Note, "Compulsory Sterilization of Criminals -- Perversion in the Law; Perversion of the Law," 15 SYRACUSE L. REV. 738, 753 (1964) (calling Judge Gary's decision the best example of "perversion of the law.") Judge Gary actively campaigned for a state sterilization statute. Ferster, supra, at 609. In Wade v. Bethesda Hospital, supra, Judge Gary, the physician, and a hospital were sued for three million dollars in damages by Carolyn Wade, a 22 year old, married, mentally retarded woman whom Judge Gary had ordered sterilized. The federal court rejected Judge Gary's defense of judicial immunity, finding that neither Ohio's commitment statutes nor the general equity powers of an Ohio probate court gave Judge Gary the power to approve involuntary sterilizations. Id., at 673-674. Finding no judicial precedent for such an order in the absence of a specific state statute, the court held that Judge Gary could not claim judicial immunity. Id., at 674. But see Stump v. Sparkman, 434 U.S. 815 (1978),

wherein Judge Stump was granted judicial immunity in similar circumstances.

In In the Matter of Sallmaier, Judge Leviss approved the sterilization of a 23 year old brain-damaged woman with an I.Q. of 62. Id., at 990. Judge Leviss found that the woman was unable to consent to or to withhold consent from the sterilization, that her menstrual cycle had to be handled by her mother, that she had many phobias, and that she refused all medications (eliminating a lesser restrictive measure to prevent conception, the birth control pill). Judge Leviss found that the court's jurisdiction to order sterilization arose not from any specific statute, "but from the common law jurisdiction of the Supreme Court to act as parens patriae with respect to incompetents." Id., at 991. Judge Leviss found that sterilization would be in the young woman's best interest, largely because of expert psychiatric testimony:

> ...the court has given great weight to the testimony of the court-appointed psychiatrist that in his expert opinion sterilization is recommended because pregnancy would have a substantial likelihood of causing a psychotic reaction in respondent. From this expert opinion, coupled with the recommendation by the guardian ad litem, the opinion of the family psychiatrist, respondent's proclivity for encounters with males and the testimony of respondent's parents, the court has concluded that it would be in the best interest of respondent to have a sterilization procedure performed.

Id., at 991.

Where the "best interest" standard is invoked to authorize involuntary sterilization, commentators strongly urge that specific standards be met and that stringent procedural safeguards be accorded the incompetent. Comment, 27 BAYLOR L. REV. 174, 181 (1975) and Ferster, supra, at 621.

G. Any procedure for the involuntary sterilization of mentally retarded individuals should include an examination of lesser restrictive alternatives to achieve the state's purposes.

Whenever the state infringes upon a constitutionally protected fundamental right, that infringement must employ the "least drastic means" for achieving the state's purpose. Shelton v. Tucker, 364 U.S. 479 (1960); Butler v. Michigan 352 U.S. 380 (1957); Schneider v. Town of Irving, 308 U.S. 147 (1939); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). The Supreme Court explained this doctrine of "least drastic means" as follows:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, supra, at 488. The principle of "less drastic means" or "least restrictive alternative" has been applied to mentally retarded persons in a number of contexts, including commitment to state institutions. See Halderman v. Pennhurst, supra, at 1319 and cases cited therein.

The Texas Legislature has endorsed the constitutional principle of least restrictive alternative in two recently enacted statutes affecting the mentally retarded, the Mentally Retarded Persons Act, TEX. REV. CIV. STAT. ANN. art 5547-300 (Vernon Supp. 1980) and the Limited Guardianship Act, TEX. PROB. CODE ANN. § 130A-0 (Vernon Supp. 1980). The Limited Guardianship Act itself embodies the principle of less drastic means, providing that mentally re-

tarded persons who are capable of making some but not all of their own personal or financial decisions may be afforded a limited guardianship. In a limited guardianship, the limited ward retains all rights he is capable of exercising for himself. TEX. PROB. CODE ANN. § 130H (Vernon Supp. 1980). The Mentally Retarded Persons Act also incorporates the principle of least restrictive alternative:

> Section 7. RIGHT TO LEAST RESTRICTIVE LIVING ENVIRONMENT. Every mentally retarded person shall have the right to live in the least restrictive setting appropriate to his individual needs and abilities...
>
> Section 15. RIGHT TO LEAST RESTRICTIVE ALTERNATIVE. Each client shall have the right to live in the least restrictive habilitation setting appropriate to the individual's needs and be treated and served in the least intrusive manner appropriate to the individual's needs.

TEX. REV. CIV. STAT. ANN. art. 5547-300, §§ 7, 15 (Vernon Supp. 1980). In accordance with the constitutional principle of less drastic means, a state may not irreversibly deprive a mentally retarded person of the right to bear children where less intrusive and lesser restrictive alternatives are available. Bergdorf and Bergdorf, supra, at 1031-1032, and Murdock, supra, at 927-928. In at least one involuntary sterilization case, a court refused to approve the sterilization, holding that less drastic alternatives must be explored. In re Anderson, No. 5-67-11648 (Dane County Ct., Wis. Nov. 1974), cited in Bergdorf and Bergdorf, supra, n. 264 at 1032.

Reversible contraceptive devices such as the IUD and birth control pills are certainly less drastic than irreversible sterilization procedures to prevent unwanted pregnancies. These and other reversible contraceptives can be successfully used by mentally retarded persons. See Fujita, supra,

at 195-197. In addition, sex education and training programs may help retarded persons to learn appropriate sexual behavior. These alternatives and others should be explored before involuntary sterilization may be constitutionally imposed on a mentally retarded person. Finally, where a choice must be made between irreversible sterilization procedures, the doctrine of less drastic means would compel selecting the least intrusive and least invasive method of sterilization.

H. The applicable standard of proof.

The usual standard applied by courts in civil cases is the "preponderance of the evidence" standard. However, some infringements upon constitutionally protected fundamental interests may work such serious personal deprivations upon citizens that a high standrad of proof is required. Thus, in Addington v. Texas, 47 U.S.L.W. 4473 (1979), the Supreme Court held that because an individual's liberty interest in the outcome of a civil commitment hearing is of such weight and gravity when compared with the state's interests in such matters, a "clear and convincing" standard of proof is required in involuntary commitment proceedings. Addington v. Texas, supra, at 4477. The standards prerequisite to involuntary commitments to state schools for the mentally retarded must be established "beyond a reasonable doubt." TEX. REV. CIV. STAT. ANN. art. 5547-300, § 37(m)(6) (Vernon Supp. 1980). Use of the standard proof required in criminal proceedings suggest that the Texas Legislature views commitment to a state school as a grave infringement upon a mentally retarded person's liberty.

At least one court that has considered the question in the context of involuntary sterilization has held that in order to prevent abuse of the

state sterilization statute, a "clear, strong, and convincing" standard must be used:

> Here, it is clear that the General Assembly intended to provide the mentally ill and defective with sufficient safeguards to prevent misuse of this potentially dangerous procedure. The statute does not specify the burden of proof that the petitioner must meet before the order authorizing the sterilization can be entered. In keeping with the intent of the General Assembly, clearly expressed throughout the article, that the rights of the individual must be fully protected, we hold that the evidence must be clear, strong and convincing before such an order may be entered.

In re Sterilization of Moore, supra, at 315.

Should this Court decide that it has jurisdiction under the doctrine of parens patriae to grant an application for involuntary sterilization in this matter, the "substituted judgment" doctrine or the "best interests" test will likely be employed to determine whether involuntary sterilization is necessary or appropriate for Sylvia Jean Gonzalez. As noted above, procedural due process protections and substantive standards should be followed when a court in equity invokes its parens patriae powers to consider an application for involuntary sterilization.

Amicus believes that the procedural due process protections accorded the ward in this cause are ample and will not discuss here the need for such protections, except to suggest to this Court that an interview with the ward, outside the presence of her guardians, would be appropriate. In camera interviews are sanctioned under Texas law and are employed when the person to be interviewed is a minor or incompetent and likely to be subject to pressure from his family and others close to him. See TEX. REV. CIV. STAT. ANN. art. 4590-2a, §2(c) (Vernon Supp. 1980) and TEX. FAM. CODE ANN. §14.07(c) (Vernon Supp. 1980). The United States Supreme Court has recognized that a defendant's mental retardation may make him highly suggestible and particulary susceptible to influence and pressure from his family and others close to him. Fikes v. Alabama, 352 U.S. 192, 193 (1957); Culombe v. Connecticut, 367 U.S. 568, 621 (1961). The defendant Culombe was an illiterate "thirty-three year old mental defective of the moron class with an intelligence quotient of sixty-four and mental age of nine to nine and a half years," although he was more experienced and reacted somewhat

differently from a nine year old child. Id., at 620. The Supreme Court noted that Culombe was suggestible and could be intimidated:

> The report of a clinical psychologist appointed by the court to examine Culombe both for the State and for the defense states: "In addition to being saddled with deficient mental equipment with which he must try to cope with life's problems, Mr. Culombe is also possessed of that character defect so frequently found in individuals of low intellectual calibre: he is enormously suggestible. Thus, lacking in the capacity for sufficient critical judgment, his manner of thinking, his pattern of living and his way of behaving can all easily be influenced by those persons closest to him.

Id., n. 72 at 621. See also: Person, "The Accused Retardate," 4 COLUM. HUMAN RIGHTS L. REV. 239, 254 (1972). In suggesting that an "in chambers" interview with Sylvia outside the presence of her parents and guardians would be appropriate, Amicus in no way intends to impugn the motives or actions of petitioners in this cause. However, in light of the extreme suggestibility of mentally retarded individuals, Amicus recommends that this Court conduct an "in chambers" interview with the ward, outside the presence of her guardians.

To ensure that the "substituted judgment" and "best interests" tests are not applied arbitrarily or capriciously in suits for involuntary sterilization, specific substantive standards should be met. For the benefit of this Court and all parties in this matter, Amicus presents below a number of substantive standards which the Court may wish to consider should it find it has jurisdiction in this cause.

1. That the person to be involuntarily sterilized is physically capable of procreation.

As noted, supra, at p. 15 many mentally retarded individuals are sterile and incapable of bearing or begetting children. Such persons should not be subjected to the risks of a sterilization procedure when it clearly serves no reasonable purpose.

2. That the person engages in sexual activities at the present or will engage in such activities in the near future under circumstances likely to result in pregnancy.

If the person is not sexually active and is not likely to have sexual intercourse in the near future under the circumstances likely to result in pregnancy, then there is a necessity or compelling state interest in having that person involuntarily sterilized. Comment, 27 BAYLOR L. REV. 174, 183 (1975). That the ward was "sexually promiscuous" or had a "proclivity for encounters with males" were important considerations in two of the cases granting involuntary sterilization petitions in the absence of a specific statute. In the Matter of Gallmaier, supra, at 991; In re Simpson, supra, at 207.

3. That all less drastic contraceptive methods are unworkable, inapplicable, or medically contraindicated.

In keeping with the constitutional principle of "less drastice means" or "least restrictive alternative," the court should ensure that least restrictive means for preventing conception are considered and ruled out because they are unworkable, inapplicable, or medically contraindicated.

See discussion, supra, at pp.27-28.

4. That the nature and extent of the person's disability renders him or her permanently incapable of caring for a child, even with reasonable assistance.

That the person is and will be incapable of being a fit parent if he or she procreates is a common rationale for demonstrating the compelling state interest necessary for the state's infringement on a person's fundamental, constitutional right to bear or beget children. See discussion, supra, at pp. 16-19. At least one commentator urges that courts make this finding only on the basis of demonstrable inability to care for children the person has already borne. Comment, 27 BAYLOR L. REV. 174, 184-185, 195 (1975). Unfitness for parenting was an important factor in at least two cases in which the court ordered involuntary sterilization absent a specific state statute. In The Matter of Grady, supra, at 853, and In re Simpson, supra, at 207-208.

5. That there is a medical necessity that the person be sterilized or that the person will suffer severe physical, psychological, or psychiatric harm if he or she parents a child.

There may be compelling medical reasons, such as a malignancy, for finding that involuntary sterilization would be in a person's best interests. Where there are compelling and demonstrable medical justifications for sterilization, involuntary sterilization should be permitted.

In addition, if it is reasonably certain that the person will suffer severe psychological harm if he or she parents a child, sterilization may well be

in the person's best interests. See Comment, 27 BAYLOR L. REV. 174, 184, 195 (1975). That the mentally retarded person suffered "many phobias" and that pregnancy, according to expert psychiatric testimony, "would have a substantial likelihood of causing a psychotic reaction" appeared to be critical factors in the court's decision to approve involuntary sterilization in In re Sallmaier, supra, at 990-991. Courts should be wary of benefits which are purely speculative. Psychiatric and psychological evaluations may assist the trial court in determining whether or not the person stands to suffer psychological harm if he or she bears children.

In this regard, it is argued by some that involuntary sterilization may promote a mentally retarded person's development and growth because less supervision will be needed, fostering greater opportunities for independence. See In the Matter of Grady, supra; and Vining and Froeman, "Sterilization of the Retarded Female: Is Advocacy Depriving Individuals of Their Rights?" 62 PEDIATRICS (5) 830 (Nov. 1978). Involuntary sterilization may foster "normalization" and facilitate the mentally retarded person's entry into and further participation in community life. However, sterilization may also thwart a mentally retarded person's "normalization" by depriving him or her of opportunities for a normal marriage and family life. Sabagh, supra.

> One girl's marriage proposal failed because she did not want to admit to the parents of the prospective groom that she was sterilized. As she expressed it:
>
> > "I couldn't do it because his parents wanted us to have children. When I heard this, I said, 'No, I don't never want to get married.' I almost told her (the mother) why but I just couldn't bear to tell her."
>
> One basis for this feeling that sterilization impedes passing as normal is that it prevents one from assuming the basic roles of father and mother. This attitude was clearly revealed in the statements made by many

patients, particularly female patients. For example, a married female, age 28, stated:

> "I'd like to have one or two kids but not a whole lot. I take care of everybody else's kids and everybody tells me I'm good with children and they ask me why I don't have one of my own and I just say that I can't have one."

Sabagh, supra, at 219-220

6. That the person will not suffer psychological or psychiatric harm if he or she is sterilized.

In deciding whether involuntary sterilization is in a person's best interest the court should consider the potential for psychological or psychiatric harm as a result of the sterilization procedure. In reviewing the literature, Wolf found that sterilization could be psychologically harmful to a woman, particularly where she had only one or two children, was relatively young, and had a history of neurotic behavior or psychiatric problems. Wolf, R. C., "Legal and Psychiatric Aspects of Voluntary Sterilization," 3 J. FAM. L. 103 (1963). One review of the scientific literature indicates that the regret rate for voluntary sterilizations may be as high as 25%. Schwyhard and Kutner, "A Reanalysis of Female Reactions to Contraceptive Sterilization," 156 J. NERVOUS & MENT. DISEASE 354 (1973). Schwyhart identified the following factors which pose risks of regret: unsatisfied maternal desire; presence of psychopathology; high religiosity or family pressure that could produce guilt feelings; marital instability, negative spousal attitude toward the effects of sterilization, or manipulation by the spouse to have the operation; and misconceptions about the irreversibility and effects of sterilization and about alternative birth control methods. Schwyhart, supra,

at 366. Sabagh's study indicates that many involuntarily sterilized retarded persons view the procedure as humiliating and punitive, symbolic of their degraded status:

> A number of patients, particularly those most strongly opposed to sterilization, associate the eugenic operation with punishment and humiliation. A woman age 30 was very disturbed by questions pertaining to sterilization. She demanded an interview with the doctors at the hospital for discussion of what was done to her and why. She was brought to the hospital and given an explanation of the operation, and while the explanation and the kindness of the physicians pleased her, the realization of the permanency of the operation upset her. In her words:
>
> > "Gee, I sure would like to have a baby... They never told me that they were going to do that surgery to me. They said they were going to remove my appendix and they they did that other. They should have explained to me...After they did that surgery to me, I cried...I still don't know why they did that surgery to me. The sterilization wasn't for punishment, was it? Was it because there was something wrong with my mind?"

Sabagh, supra, at 220. See also Roos, supra, at 45.

In light of these studies indicating that many mentally retarded persons suffer psychological harm from involuntary sterilization, the potential for such harm should be examined by this Court if it determines it has jurisdiction to order involuntary sterilization.

7. That the guardians consent to the sterilization.

As persons legally responsible for the ward's care and well-being, the guardians should consent to the proposed sterilization procedure before the court orders involuntary sterilization.

8. That the ward agrees with the proposed procedure or is incapable of indicating whether or not he or she wants to be sterilized.

Amicus urges that involuntary sterilizations should not be performed on mentally retarded individuals who express disagreement with the proposal. The potential for psychological or psychiatric harm in such persons is likely to be high and sterilization in such circumstances is unlikely to be in the individual's best interests.

To evaluate this factor, Amicus suggests that the court conduct an "in chambers" interview of the ward, out the presence of her guardians. See discussion, supra, at pp. 30-31.

9. That the person will not develop sufficiently in the forseeable future to make an informed decision about sterilization.

Voluntary sterilization is obviously preferable to involuntary sterilization. If the mentally retarded individual, with further development and training can progress to a point in the foreseeable future where she can decide about sterilization herself, then involuntary sterilization should not be ordered, absent compelling and immediate medical or psychological reasons. Such an individual may later decide against sterilization, giving rise to the potential for psychological harm if involuntary sterilization had been ordered.

10. That the person would consent to the sterilization if he or she were capable.

If the Court finds jurisdiction in this cause and invokes the substituted

judgment doctrine, then the Court should consider whether or not the person would consent to sterilization if he or she were capable of consenting.

11. That the operative and long-term medical risks of the proposed method of sterilization are minimal and medically acceptable.

In evaluating whether or not involuntary sterilization is in the ward's best interests, the court should be assured that the proposed method of sterilization will not pose significant medical risks to the ward.

12. That the proposed method of sterilization is the least invasion of the person's body.

In keeping with the constitutional principle of "least restrictive alternative," the court should insure that the method of sterilization chosen is the least invasive of the person's body. Hysterectomy, for example, is clearly a more invasive method for preventing conception than is tubal ligation. See Comment, 27 BAYLOR L. REV. 174, 186 (1975).

13. That the current state of scientific and medical knowledge suggests that no reversible sterilization procedure or other workable, less drastic contraceptive method will shortly be available.

In accordance with the constitutional principle of "least restrictive alternative" and in the absence of compelling and immediate medical or psychological reasons for involuntary sterilization, the court should consider whether science is on the eve of a reversible sterilization procedure or a

workable new method of contraception that could result in a lesser infringement of the person's right of procreation. See Vukowich, supra, at 220.

14. That science is not on the threshold of an advance in the treatment of the individual's disability.

As discussed, supra, at p. 15. mental retardation may be caused by purely environmental factors or by a combination of environmental and genetic factors. Researchers are investigating both medical and habilitative ways of improving the intellectual functioning of retarded individuals. Absent compelling and immediate medical or psychological reasons for sterilzation, involuntary sterilization should not be ordered by a court when science is on the eve of a treatment which would improve the individual's functioning and allow her to decide for herself whether or not she wants to be sterilized. In this regard, the court in In the Matter of Sallmaier noted that the person to be involuntarily sterilized had an irreversible handicap. In the Matter of Sallmaier, supra, at 990.

Should this Court determine that if has jurisdiction to order involuntary sterilization, Amicus urges that the foregoing substantive standards be carefully considered by the Court in its disposition of this case.

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